TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 682.

UNION PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

GEORGE A. SNOW AND ROBERT W. BURTON (SAID BURTON DOING BUSINESS AS AN INDIVIDUAL UNDER THE NAME AND STYLE OF THE BYERS MERCANTILE COMPANY).

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

FILED AUGUST 15, 1913.

(23,833)

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1 UNITED STATES OF AMERICA,
Supreme Court of Colorado, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Colorado, in the City of Denver, this July 31, 1913.

[Seal Supreme Court, State of Colorado.]

JAMES R. KILLIAN,
Clerk Supreme Court of Colorado.

Cost of this transcript, $33.60.

2 No. 6951.

UNITED STATES OF AMERICA,
State of Colorado:

In the Supreme Court.

Be it remembered that on the 14th day of September, A. D., 1909, there was filed in said Supreme Court a transcript of record, of which transcript the following is a true copy, to-wit:

District Court, County of Arapahoe, First Judicial District.

STATE OF COLORADO,
County of Arapahoe:

Pleas in the District Court of the County of Arapahoe, State of Colorado, before the Hon. Charles McCall, Judge of the First Judicial District of the said State, at a term thereof begun and held at the court house in Littleton, in said county, on the first Tuesday (it being the 2nd day) of March, A. D. one thousand nine hundred and nine.

Present:

Hon. Charles McCall, Judge of the District Court.
Walter M. Morgan, Esq., District Attorney of said District.
Joseph A. Skerritt, Esq., Sheriff of said county.
Wm. H. Shea, Esq., Clerk of said court.

3 UNION PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
GEORGE A. SNOW and ROBERT W. BURTON, Said Burton Doing Business as an Individual under the Name and Style of The Byers Mercantile Company, Defendants.

Be it remembered, That heretofore, and on, to-wit, the 9th day of

May A. D. 1908, came the plaintiff and filed herein its complaint, and said complaint is in words and figures as follows, to-wit:

STATE OF COLORADO,
County of Arapahoe, ss:

In the District Court.

UNION PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
GEORGE A. SNOW and ROBERT W. BURTON, Said Burton Doing Business as an Individual under the Name and Style of The Byers Mercantile Company, Defendants.

Complaint.

Now comes the plaintiff above named, and for cause of action alleges:

First. That the plaintiff is now and at all times with reference to which it is hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of
4 Utah, and is and was at all of said times a railroad company, carrying on the business of transporting freight and passengers between points situate in different states, and a common carrier thereof for hire, and engaged in the business of interstate commerce, as an instrumentality thereof.

Second. That the plaintiff herein, at the time of the commencement of this action, and for a long time prior thereto, was, ever since has been and now is, the owner in fee simple and entitled to the exclusive possession of each and every part of a certain tract of land, situate, lying and being in the County of Arapahoe, State of Colorado, which tract of land is a part of the East one-half (E. ½) of the Southeast quarter (S. E. ¼), of section eight (8), Township four (4) South, Range sixty-one (61) West, and is more particularly described as follows, to-wit:

Beginning at a point on the east boundary line of Section eight (8), Township four (4) South Range sixty-one (61) West, which is one hundred and fifty (150) feet distant southwesterly from and at right-angles to the center line of the main track of Union Pacific Railroad Company, the plaintiff herein; thence northwesterly along a line one hundred and fifty (150) feet from and parallel with the center line of said main track, a distance of one hundred and sixty-two and one-half (162½) feet, more or less, to a point; thence southwesterly and at right-angles to the center line of said main track, a distance of fifty (50) feet, to a point; thence southeasterly along a line two hundred (200) feet from and parallel with the center line of said main track, a distance of one hundred and seventy-five (175) feet, more or less, to the east boundary line of said section; thence north along said east boundary line of said section to the place of beginning.

That said premises are a portion of a tract of land four hundred (400) feet in width, being two hundred (200) feet on each side of

e center of the track of Union Pacific Railroad Company as the
ne crosses said East one-half (E. ½) of the Southeast quarter
. E. ¼) hereinabove mentioned, which said tract is part of a
continuous tract of land of like width granted to the prede-
cessors in title of the plaintiff herein as and for a right of
way for a line of railroad and telegraph, extending from a
int on the Missouri River in the State of Missouri where Kansas
ty is now located, through what is now the States of Kansas, Colo-
do and Wyoming, and through the City of Denver, and to a con-
ction with the main line of Union Pacific Railroad Company at
eyenne, in Wyoming, under and by virtue of a certain Act of
ngress entitled "An Act to aid in the construction of a railroad
d telegraph line from the Missouri River to the Pacific Ocean, and
secure to the Government the use of the same for postal, military
d other purposes," approved July 1st, 1862, and the subsequent
cts of Congress amendatory thereof and supplemental thereto; that
e predecessors in title to plaintiff accepted said Acts and grant
ereby made and complied with all of the conditions thereof, and
at one of the lines of railroad and telegraph contemplated by said
cts of Congress and constructed thereunder, and in reference to
hich said grant of a strip of ground four hundred (400) feet in
dth was made, was laid across the said East one-half (E. ½) of the
outheast quarter (S. E. ¼) hereinabove described, and ever since
s been and now is continuously operated as a railroad and tele-
aph line by plaintiff herein and its said predecessors in title; and
at each and every part of said strip of land four hundred (400)
et in width, as the same passes through said East one-half (E. ½)
said southeast quarter (S. E. ¼), at all of the times mentioned
erein was and is now necessary for the uses of plaintiff herein and
s various predecessors in title, for the purposes mentioned in said
cts of Congress, and for which said grant was made; that prior to
the commencement of this action, plaintiff herein, by various
mesne conveyances, became the owner of said railroad and
telegraph line, and of said premises first hereinabove described
a portion of said strip of ground four hundred (400) feet in width,
d ever since has been and now is entitled to the possession thereof,
d of each and every part of the same.

Third. That the defendants herein have wrongfully ousted the
aintiff and its predecessors in title from said premises first herein-
ove specifically described as a portion of said four hundred (400)
ot strip, and while plaintiff or its predecessors in title were right-
lly in possession and entitled to possession of the same, and ever
nce have and now do wrongfully withhold possession thereof from
e plaintiff.

That the defendant George A. Snow wrongfully claims owner-
ip, as plaintiff is informed and believes, in fee simple of all of
id premises first hereinabove specifically described and wrongfully
aims the right of possession of all thereof, and is himself in the
tual possession thereof, either in person or through his tenant,
ssee or licensee, as hereinafter more particularly mentioned, and
rongfully withholds the same from the plaintiff.

Fourth. That the defendant Robert W. Burton, doing business as The Byers Mercantile Company, as tenant, lessee or licensee of said defendant Snow, wrongfully claims, as plaintiff is informed and believes, the possession and right of possession, of all or some part of said premises first hereinabove specifically described, and is in the actual possession by, under and through wrongful leave, license and consent of said defendant Snow, and wrongfully withholds from the plaintiff in the manner aforesaid the said premises, or some
7 part or portion of the same, the exact boundaries of which part or portion, and the exact terms under which the same is held or claimed, as between the said Snow and Burton, plaintiff is unable to state with accuracy.

Fifth. Plaintiff further alleges that by reason of said wrongful ouster and said wrongful possession by defendants, and said wrongful withholding of said possession from the plaintiff by defendants, plaintiff has been damaged in the sum of two thousand five hundred ($2,500.00) dollars.

Wherefore, plaintiff prays that it may be adjudged to be the owner in fee of the premises first hereinabove specifically described, and entitled to the immediate possession of the same, and each and every part thereof; that it may have judgment of ouster against the defendants, and each of them, and special execution in the nature of a writ of possession against said defendants, and each of them, directing the sheriff to put the plaintiff into immediate and complete possession thereof; that the plaintiff may recover judgment against said defendants in the sum of two thousand five hundred ($2,500.00) dollars, and for its costs in this behalf expended, and for such other further and different relief as to the court may seem meet and just in the premises.

(Signed) DORSEY & HODGES,
Attorneys for Plaintiff.

STATE OF COLORADO,
City and County of Denver, ss:

Clayton C. Dorsey, being first duly sworn, on his oath deposes and says: that he is one of the attorneys for the above named plaintiff; that said plaintiff is a corporation, and for that reason he makes this verification in its behalf; that he has read the foregoing complaint and knows the contents thereof, and that the same is
8 true to the best knowledge and belief of affiant.

(Signed) CLAYTON C. DORSEY.

Subscribed and sworn to before me this 9th day of May, A. D. 1908.

My commission expires Oct. 16, 1909.

(Signed) EWALD W. HEINEMANN,
[NOTARIAL SEAL.] *Notary Public.*

Endorsed: No. 198. In the District Court of Arapahoe County, Colo. Union Pacific Railroad Co., Plaintiff, vs. Geo. A. Snow and Robt. W. Burton, said Burton doing business under name of The Byers Mercantile Company, Defendants. Complaint. District Court.

led May 9, 1908. Arapahoe County, Colo. (Signed) Edward H. llertson, Clerk. Dorsey & Hodges, Attorneys for Plaintiff.

And thereafter summons issued out of said court, directed to the id defendants, and said summons is in words and figures as follows, -wit:

TATE OF COLORADO,
County of Arapahoe, ss:

In the District Court.

UNION PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
GEORGE A. SNOW and ROBERT W. BURTON, Said Burton Doing Business as an Individual under the Name and Style of The Byers Mercantile Company, Defendants.

Summons.

The People of the State of Colorado to the Defendant Above named, Greeting:

You are hereby required to appear in an action brought against ou by the above named plaintiff, in the District Court of the County of Arapahoe, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if you are served within his county; if served out of this county, or by publication, within hirty days after service hereof exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint.

If a copy of the complaint be not served upon you herewith, or if service hereof be made out of the State of Colorado, ten days' additional time to that above specified shall be allowed for your appearance and answer in said action.

This is an action brought by the plaintiff, Union Pacific Railroad Company, to recover the possession of a certain tract of land situate in the county of Arapahoe, State of Colorado, which said tract of land is a part of the East half (E. ½) of the south east quarter (S. E. ¼) of section eight (8), Township four (4) South, Range sixty-one (61) West, and is part of the Union Pacific right of way at or near the Town of Byers, State of Colorado. Plaintiff claims ownership in fee in said tract of land, and the immediate possession thereof, and prays for judgment of ouster against each and all of the defendants above named, writ of possession, and damages in sum of two thousand five hundred ($2,500) dollars for unlawful ouster and detention of possession, for costs of this suit and such other further and different relief as to the court may seem meet and proper in the premises; said premises being more particularly described in the complaint filed herein and to which reference is here made.

Witness Edward H. Albertson, Clerk of said court, with the seal thereof hereunto affixed, at office, in the town of Littleton, this 9th day of May A. D. 1908.

[SEAL.] (Signed) EDWARD H. ALBERTSON, *Clerk.*

STATE OF COLORADO,
City and County of Denver, ss:

I do hereby certify that I have duly executed the within summons this 10th day of May A. D., 1908 by leaving with the within named defendants G. A. Snow (By his wife) & R. W. Burton a true copy of the within summons and complaint, accepting service this date.

(Signed) GEO. E. BEACH, *Sheriff.*
(Signed) By F. M. WEDOW.

Endorsed: Filed in District Court May 12" 1908. (Signed) Edward H. Albertson, Clerk.

And afterwards, and on to-wit, the 29th day of May, A. D. 1908, come the defendants by their attorney, and filed herein their demurrer, and said demurrer is in words and figures as follows, to-wit:

STATE OF COLORADO,
County of Arapahoe, ss:

In the District Court.

UNION PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
11 GEORGE A. SNOW and ROBERT W. BURTON, Said Burton Doing Business as an Individual under the Name and Style of The Byers Mercantile Company, Defendants.

Come now the defendants in the above entitled cause, by their attorneys, Milton Smith, Charles R. Brock and W. W. Platt, and demur to the complaint therein, and for a ground of demurrer allege and say:

That the said complaint does not state facts sufficient to constitute a cause of action as against these defendants.

(Signed) MILTON SMITH.
(Signed) CHARLES R. BROCK.
(Signed) W. W. PLATT.
Attorneys for Defendants.

Endorsed: No. 198. In the District Court in and for Arapahoe County. Union Pacific Railroad Company, Plaintiff, v. George A. Snow et al., Defendants. Demurrer. District Court. Filed May 29" 1908. (Signed) Edward H. Albertson, Clerk. Milton Smith, Chas. R. Brock, Attorneys for Defendants.

And afterwards, and on, to-wit, the 30th day of November, A. D., 1908, the same being one of the regular juridical days the November term, A. D., 1908, of said Court, the following ceedings inter alia, were had and entered of record in said court, it:

UNION PACIFIC RAILROAD COMPANY, a Corporation,

vs.

GEORGE A. SNOW et al.

At this day come the parties hereto by their attorneys respectively, d thereupon this cause coming on to be heard upon the demurrer said defendant to the complaint herein, is argued by counsel, and Court being fully advised,

t is ordered by the Court that the demurrer of the defendants be l is hereby overruled, and defendant is given twenty days in ich to answer.

And afterwards, and on to-wit, the 19th day of December, A. D. 08, a stipulation was filed in said case, which stipulation is in rds and figures as follows, to-wit:

ATE OF COLORADO,
County of Arapahoe, ss:

In the District Court.

UNION PACIFIC RAILROAD COMPANY, Plaintiff,

v.

GEORGE A. SNOW and ROBERT W. BURTON, Said Burton Doing Business as an Individual under the Name and Style of The Byers Mercantile Company, Defendants.

Stipulation.

It is hereby stipulated and agreed, that the defendants in the ove entitled action may have up to and including Tuesday the th day of December, A. D. 1908, in which to file their answer in the above entitled action.

(Signed) DORSEY & HODGES,
For Plaintiff.
MILTON SMITH,
CHAS R. BROCK,
W. W. PLATT,
Attorneys for Defts.

Endorsed: No. —. In the District Court of Arapahoe County. nion Pacific Railroad Company, Plaintiff, v. George A. Snow and obert W. Burton, said Burton doing business as an individual nder the name and style of The Buyers' Merc. Co. Stipulation. istrict Court. Filed Dec. 19, 1908. Arapahoe County, Colo.

(Signed) E. H. Albertson, Clerk. Milton Smith, Chas. R. Brock, Attorneys for Defendants.

And afterwards, and on to-wit, the 4th day of January, A. D. 1909, came said defendants by their attorneys and filed herein their answer, and said answer is in words and figures as follows, to-wit:

STATE OF COLORADO,
County of Arapahoe, ss:

In the District Court.

UNION PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff,
v.
GEORGE A. SNOW and ROBERT W. BURTON, Said Burton Doing Business as an Individual under the Name and Style of The Byers Mercantile Company, Defendants.

Answer.

11 Come now the defendants above named, and for answer to the complaint in the above entitled action allege:

First Defense.

That they admit the allegations contained in the first paragraph of the complaint, but deny each and every other allegation in the said complaint alleged.

Second Defense.

That subsequent to the act of congress referred to in the complaint as having been approved July 1, 1862, and prior to the time when the corporation by said act created, its successors or assigns, took any steps thereunder to establish or construct any line of railroad, it was declared by a certain other act of congress, approved in 1864, which was amendatory of the aforesaid act approved July 1, 1862, that two hundred (200) feet in width, and no more, should constitute the right of way of any railroad which might be constructed under the authority of the said act approved July 1, 1862, and the subsequent acts amendatory thereof; that the said act provided and contemplated that the said right of way should consist of one hundred (100) feet on either side of the center line of the railroad track when established and constructed; that the property in the complaint described and now in the possession of these defendants is more than one hundred (100) feet from the center line of the plaintiff's track, and neither the plaintiff nor any of its predecessors has ever at any time been in possession or occupation of any portion thereof, nor has the plaintiff or any of its predecessors ever used or occupied the same or any portion thereof for railroad or other pur-

poses; that the plaintiff does not now, nor has it or any of its predecessors ever at any time in the past needed or required the said parcel of land or any portion thereof for railroad purposes; that these defendants, and those under and through whom they claim title, acquired said title under and by virtue of a patent from the United States of America, which issued on November 5, 1878, and various mesne conveyances, thereafter duly executed, and under such right they have been in the open, notorious, continuous, peaceable, undisturbed and undisputed adverse possession of all of the property in the complaint described, during all of the period of time that has elapsed since the date of the issuance of the patent as aforesaid, which is more than the full period of seven years next before the institution of this action, and during all of the said period of time these defendants and their predecessors have paid and caused to be paid all taxes which have been assessed against said property. And these defendants now plead and rely upon the statute of limitation of the State of Colorado in such cases made and provided in bar of this action.

Third Defense.

That any right received or acquired by the corporation which was created by the congressional act approved July 1, 1862, in the complaint mentioned, or by the successors or assigns of said corporation, in or to the property in the complaint described, was at most the grant of a limited fee, which grant was made on the condition that said property should revert to the United States, or to its assigns, in the event that said corporation should fail for a reasonable time actually to appropriate and use the said land for railroad purposes, or should thereafter cease to use the said land for such purposes; that thereafter, and before the said land in the complaint described, or any thereof, was ever used or occupied by said corporation, its successors or assigns, or by any one, for railroad purposes, the right of reverter which was retained in the United States at the time of the passage of the act of congress approved July 1, 1862, was conveyed, transferred and assigned by the United States to these defendants and their grantors; that this was done by a patent which was granted by the United States to the vendor of these defendants in the year A. D. 1878; that neither the said corporation so organized as aforesaid nor any of its successors or assigns ever at any time, whatever, took possession of, used or occupied the land in question, or any thereof, for railroad purposes, or for any purpose, whatever; that said corporation so organized as aforesaid, its successors and assigns, failed for a reasonable time, and altogether failed, to use or occupy the said land or any thereof for railroad purposes, and on account of such failure the said corporation, its successors and assigns, lost any and all right thereto which may have been granted by said act of congress, and the whole of the property in the complaint described as being in the possession of these defendants reverted to the United States and to these defendants as the assignees of the United States; that the whole of said property

in the possession of these defendants is situate more than one hundred (100) feet from the center line of the plaintiff's railroad track; that neither the plaintiff nor any of its predecessors ever needed the said property or any thereof for railroad purposes, and the plaintiff does not now need and in the very nature of things can never need the same or any thereof for such purposes. That on account of the failure as aforesaid of the plaintiff and its predecessors to use or occupy the said land for railroad purposes for a period which
17 now approximates fifty (50) years next ensuing after the approval of the congressional act of 1862, the limited fee which may have been granted by the predecessor of the plaintiff by said act, ceased and determined, and the whole of said property so unused and unoccupied reverted to the United States and its grantees, and any and all right which the plaintiff or its predecessors may have acquired ceased and forever determined.

Counter Claim.

For further answer, and by way of counter-claim against the plaintiff, these defendants allege that the particular parcel of land by the complaint sought to be recovered, exclusive of the improvements thereon, which these defendants and their vendors have constructed, is worth not exceeding the sum of two hundred dollars ($200); that many years ago these defendants and their vendors constructed on said parcel of land buildings and improvements of the reasonable value of fifteen hundred dollars ($1,500); that said land, together with said improvements, is now worth, and at the institution of this action was worth, the sum of not exceeding fifteen hundred dollars ($1,500,); that the said building and improvements were first constructed on said property more than twenty years ago, and this was done with the full knowledge and notice of the plaintiff, and without any objection or protest on its part, and without the assertion of any claim, whatever, on the part of the plaintiff that it had any interest in or right to the said land; that neither the plaintiff nor its predecessors ever at any time used or occupied the said land or any thereof for railroad purposes or for any purpose, whatever; that by an act of congress many years ago duly enacted and ap-
18 proved, it was declared that one hundred (100) feet on either side of the center line of the track of the road of the plaintiff and its predecessors is all of the land that is necessary or proper for the right of way of its road; that for a period of more than thirty (30) years next before the institution of this action these defendants and their vendors have been in the open, notorious, continuous, peaceable, undisturbed and undisputed adverse possession of all of the property by the complaint sought to be recovered, and have placed as aforesaid valuable and lasting improvements upon said property, and during the said period of time the issues, rents and profits of said land itself, apart from the buildings, did not amount to anything at all, and was of no value, whatever; that for these defendants at this time to be deprived of the use, possession, occupation and ownership of said premises without reimbursement for

improvements which they have placed thereon, will entail upon
damage in the sum of not less than fifteen hundred dollars
500.).

herefore, the defendants, having fully answered, pray that they
be hence dismissed, with judgment for their costs in this behalf
nded to be taxed; or, if the said property should be adjudged
e plaintiff, then and in that event the defendants pray that this
be done only upon condition that the plaintiff shall, within a
to be designated by this court, pay into the registry thereof for
benefit of the defendants, the sum of fifteen hundred dollars
500.), as the value of the improvements; and, finally, they pray
ll proper relief.

(Signed) MILTON SMITH.
(Signed) CHAS. R. BROCK.
(Signed) W. W. PLATT.
Attorneys for Defendants.

STATE OF COLORADO.
City and County of Denver, ss:

e affiant, George A. Snow, being first duly sworn, on oath de-
and says: That he is one of the defendants in the above en-
action; that he has read the foregoing answer and counter-
and knows the contents thereof, and that the allegations there
are true, of his own knowledge, except as to the matters therein
ed upon information and belief, and as to such allegations, he
ves them to be true.

(Signed) GEORGE A. SNOW.

bscribed and sworn to before me this 2nd day of January,
. 1909.

y commission expires Nov. 9th, 1911.

[NOTARIAL SEAL.] (Signed) MAY STEWART,
Notary Public.

ndorsed: No. 198. In the District Court of Arapahoe County.
n Pacific Railroad Company, a corporation, Plaintiff, v. George
Snow and Robert W. Burton, &c., Defendants. Answer. Dis-
Court. Filed Jan 4, 1909. Arapahoe County, Colo. (Signed)
. H. Shea, Clerk. Milton Smith, Chas. R. Brock, Attorneys for
ndants.

And afterwards, and on to-wit, the 11th day of January,
A. D. 1909, came said plaintiff by its attorney, and filed
in its demurrer to the answer of defendants, and said demurrer
words and figures as follows, to-wit:

STATE OF COLORADO,
County of Arapahoe, ss:

In the District Court.

UNION PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
GEORGE A. SNOW and ROBERT W. BURTON, said Burton Doing Business, etc., Defendants.

Demurrer.

Now comes the plaintiff above names, and—

I.

Demurs to the second defense contained in the answer heretofore filed herein, and for ground of such demurrer shows unto the court that said second defense does not state facts sufficient to constitute a defense to this action.

II.

Demurs to the third defense contained in the answer heretofore filed herein, and for ground of such demurrer shows unto the court that said third defense does not state facts sufficient to constitute a defense to this action.

III.

Demurs to the counterclaim contained in said answer, and for ground of such demurrer shows unto the court that said counterclaim does not state facts sufficient to constitute a counterclaim, a set-off or a defense, in whole or in part, to the complaint herein.

(Signed) DORSEY & HODGES,
Attorneys for Plaintiff.

21 Endorsed No. 198. In the District Court, County of Arapahoe. Union Pacific Railroad Company, a corporation, Plaintiff, vs. George A. Snow and Robert W. Burton, Defendants. Demurrer. District Court. Filed Jan. 11, 1909. Arapahoe County, Colo. (Signed) Wm. A. Shea, Clerk. Dorsey & Hodges, Attorneys for Plaintiff.

And afterwards, and on to-wit: the 6th day of February, A. D. 1909, the following proceedings were had at chambers, and entered of record in said court as follows, to-wit:

UNION PACIFIC RAILROAD COMPANY
vs.
GEORGE A. SNOW et al.

At this day come the parties hereto, by their attorneys respectively; and thereupon, this cause coming on to be heard upon the demur-

rs of the plaintiff to the second and third defense and also to the murrer of the plaintiff to defendants' counterclaim, are argued counsel, and being now sufficiently advised in the premises, it ordered that each and every one of the demurrers be and the same e hereby sustained.

Defendant is given ten days to further plead.

Done at Golden, Jefferson county, Colorado, at Chambers, this h day of February, A. D. 1909.

(Signed) CHARLES McCALL, *Judge*.

Endorsed: District Court. Filed Feb. 8, 1909. Arapahoe County, Colo. (Signed) Wm. H. Shea, Clerk.

And afterwards, and on, to-wit, the 17th day of February, 1909, omes the defendant George A. Snow, and filed his election, which in words and figures as follows, to-wit:

TATE OF COLORADO,
County of Arapahoe, ss:

In the District Court.

THE UNION PACIFIC RAILROAD COMPANY, Plaintiff,
v.
GEORGE A. SNOW et al., Defendants.

Comes now the defendant George A. Snow in the above entitled ction, by Milton Smith and Charles R. Brock his attorneys, and lects to stand upon his answer heretofore filed herein.

(Signed) MILTON SMITH,
(Signed) CHAS. R. BROCK,
Attorneys for Defendant George A. Snow.

Endorsed: No. 198. In the District Court of Arapahoe County. The Union Pacific Railroad Company, Plaintiff, v. George A. Snow et al., Defendants. Election of Defendant Snow to stand upon his answer. District Court. Filed Feb. 17, 1909. Arapahoe County, Colo. (Signed) Wm. H. Shea, Clerk. Milton Smith, Chas. R. Brock, Attorneys for Defendant Snow.

And afterwards, and on to-wit, the 2nd day of March, A. D. 1909, the same being one of the regular juridical days of the March Term, A. D. 1909, of said court, the following proceedings were had and entered of record in said court, to-wit:

UNION PACIFIC RAILROAD COMPANY
vs.
GEORGE A. SNOW et al.

This case coming on regularly to be heard, no one appearing for either party,

It is ordered by the Court, that this case be set for trial on the 16th day of March, A. D. 1909.

And afterwards, and on to-wit, the 12th day of March, A. D. 1909, the same being one of the regular juridical days of the March Term, A. D. 1909, of said court, the following proceedings were had and entered of record in said court, to-wit:

UNION PACIFIC RAILROAD COMPANY
vs.
GEORGE A. SNOW et al.

Now on this day the court being fully advised, doth upon its own motion order that the order heretofore entered setting the above entitled cause for trial on March 16th, 1909, be and it is hereby vacated, and it is ordered that this cause be re-set for trial on the 26th day of March, A. D. 1909, at the hour of 1.30 o'clock in the afternoon.

And afterwards, and on to-wit, the 26th day of March, A. D. 1909, the same being one of the regular juridical days of the March Term, A. D. 1909, of said court, the following proceedings were had and entered of record, to-wit:

UNION PACIFIC RAILROAD COMPANY
vs.
GEORGE A. SNOW et al.

24 This cause coming regularly on to be heard, the plaintiff appeared by its attorney C. C. Dorsey, and the defendants by Charles R. Brock, their attorney.

A jury being by both parties expressly waived, this cause is now tried to the Court.

The defendants, by their attorney, move the court to dismiss the suit.

It is ordered by the Court that the said motion be and is overruled.

Come both parties and it is stipulated in open court that if witnesses were present they would testify to certain facts which were stated to this Court by C. C. Dorsey, Esq., attorney for plaintiff.

Charles R. Brock, on behalf of the defendants, moved the Court for judgment as of non-suit.

It is ordered by the Court that the said motion be and is overruled.

Charles R. Brock, Esq., on behalf of the defendants, moved for judgment in favor of defendants.

It is ordered by the Court that the said motion be and is overruled.

Come the parties and file a stipulation, which is in words and figures as follows, to-wit:

STATE OF COLORADO,
County of Arapahoe, ss:

In the District Court.

UNION PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
GEORGE A. SNOW and ROBERT W. BURTON, Defendants.

Stipulation.

It is hereby stipulated by and between the parties hereto, by their respective attorneys, and as a part of the evidence of plaintiff upon the trial of this cause, that the defendants herein did at the time of the commencement of this action, ever since have, and now do detain from the plaintiff the possession of the premises described in the complaint herein, and that prior to the commencement of this action plaintiff demanded from the defendants the possession of the same.

(Signed) DORSEY & HODGES.
Attorneys for Plaintiff.
(Signed) MILTON SMITH & CHARLES R. BROCK.
Attorneys for Defendants.

Endorsed: No. 198. In the District Court. County of Arapahoe. Union Pacific Railroad Company, Plaintiff, vs. George A. Snow and Robert W. Burton, Defendants. Stipulation. Filed March 26th, 1909. (Signed) W. H. Shea, Clerk. Dorsey & Hodges, Attorneys for Plaintiff.

The Court, having heard the evidence and listened to the arguments of counsel, and being sufficiently advised in the premises, doth find the issues herein joined in favor of the plaintiff and the findings and judgment of the Court are prepared in writing and signed by the Court, and it is ordered by the Court that the findings and judgment be entered in the judgment book of this court; which finding and judgment is in words and figures as follows, to-wit:

STATE OF COLORADO,
County of Arapahoe, ss:

In the District Court.

UNION PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
GEORGE A. SNOW and ROBERT W. BURTON, said Burton Doing Business as an Individual under the Name and Style of The Byers Mercantile Company, Defendants.

Findings and Judgment.

Now on this 26th day of March, A. D. 1909, the same being one of the regular juridical days of the March, 1909, term of said Court,

this cause coming on regularly for trial upon the merits, the plaintiff appearing by C. C. Dorsey, its attorney, and the defendants appearing by Charles R. Brock, their attorney, a jury having been expressly waived by both parties; and it appearing to the court that the said defendant, have elected to stand upon the second and third defenses and counter-claim contained in their answer (to which demurrers have heretofore been sustained), and the Court having heard the evidence and the agreements and admissions of counsel regarding the facts involved herein, and having listened to the arguments of counsel and being now fully advised in the premises, doth find the issues herein joined in favor of the plaintiff and against the said defendants, except as to the claim of plaintiff for damages, concerning which no evidence has been introduced, and doth further find:

(1) That the plaintiff was, at the time of the commencement of this action, ever since has been and now is the owner in fee and entitled to the possession of each and every part of the premises described in the complaint herein, being a certain tract of land situate, lying and being in the county of Arapahoe, State of Colorado, which tract is a part of the East one-half (E. ½) of the Southeast quarter (S. E. ¼) of Section eight (8), Township four (4) South, Range sixty-one (61) West, and is more particularly described as follows, to-wit:

Beginning at a point on the east boundary line of Section eight (8), Township four (4) South, Range sixty-one (61) West, which is one hundred and fifty (150) feet distant southwesterly from and at right-angles to the center line of the main track of the
27 Union Pacific Railroad Company, the plaintiff herein; thence northwesterly along a line one hundred and fifty (150) feet from and parallel with the center line of said main track, a distance of one hundred sixty-two and one-half (162½) feet, more or less, to a point; thence southwesterly and at right-angles to the center line of said main track, a distance of fifty (50) feet, to a point; thence southeasterly along a line two hundred (200) feet from and parallel with the center line of said main track, a distance of one hundred and seventy-five (175) feet, more or less, to the east boundary line of said section; thence north along said east boundary line of said section to the place of beginning.

(2) That the defendants, or either of them, did not, at the commencement of this action, have, have not at any time since had, nor have they now, any right, title or interest therein or thereto.

Wherefore, it is ordered and adjudged that plaintiff do have and recover from the defendants, and each of them, the premises hereinabove and in the complaint described, and the possession thereof, and each and every part of the same; and that the defendants, and each of them, be and are hereby ousted from possession of the above described property, and each and every part of the same, and that the plaintiff have against the said defendants, and each of them, special execution in the nature of a writ of possession, directing the Sheriff to put the plaintiff into immediate and complete possession of the above described property, and all thereof, and that the plaintiff do have and recover against the said defendants, and each of

nem, its costs and charges by it in this behalf expended, to be taxed; hat judgment be entered therefor, and that the plaintiff have execu- on for the same.

Done in open Court this 26th day of March, A. D. 1909.

By the Court:

(Signed) CHARLES McCALL, *Judge*.

Endorsed: In the District Court, County of Arapahoe. Union Pacific Railroad Company, a corporation, Plaintiff, vs. eorge A. Snow and Robert W. Burton, Defendants. Findings and dgment. Dorsey & Hodges, Attorneys for Plaintiff.

And now comes counsel for George A. Snow, and moves the court grant an appeal to the Supreme Court of the State of Colorado, nd asks the court to fix the amount of bond and the time for its xecution; which is granted upon condition that defendant file his ond on appeal in the sum of seven hundred fifty dollars ($750.00) ithin thirty days from this day, and he is allowed ninety days to repare and tender his bill of exceptions, which when signed and ealed by the judge of this Court shall be filed as of this day, and ecome a part of the records of this action.

And afterwards, and on to-wit, the 19th day of April, 1909, came he defendant George A. Snow, and filed his appeal bond herein, nd said appeal bond is in words and figures as follows, to-wit:

Know all men by these presents, that we, George A. Snow, of the ounty of Arapahoe in the State of Colorado, and Charles S. Owens, f the City and County of Denver in the State of Colorado, are held nd firmly bound unto The Union Pacific Railroad Company, in the enal sum of seven hundred and fifty dollars ($750.00), for the pay- ment of which well and truly to be made we and each of us bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated at Littleton this 17th day of April n the year of our Lord one thousand nine hundred and nine.

The condition of the above obligation is such, that whereas the aid The Union Pacific Railroad Company did, on the twenty-fifth ay of March, one thousand nine hundred and nine, at a term of he district court then being holden within and for the first judicial istrict, in the County of Arapahoe and State of Colorado, obtain a dgment against the above bounden George A. Snow, for the re- overy of a certain parcel of land in said judgment described, and osts of suit, from which judgment the said George A. Snow has rayed for and obtained an appeal to the supreme court of the State f Colorado:

Now therefore if the said George A. Snow shall duly prosecute said ppeal and shall, moreover, pay the amount of such judgment, costs, nterest and damages rendered and to be rendered against him, the aid George A. Snow, in case the said judgment shall be affirmed in he said supreme court, then the above obligation shall be null and oid; otherwise to remain in full force and virtue.

(Signed) GEORGE A. SNOW. [SEAL.]

(Signed) CHARLES S. OWNES. [SEAL.]

STATE OF COLORADO,
City and County of Denver, ss:

Charles S. Owens, the surety, whose name is subscribed to the above undertaking, being duly sworn on oath, deposes and says:

That he is a resident of the City and County of Denver,
30 State of Colorado, and the owner and holder of property therein.

That he is worth not less than ten thousand dollars ($10,000) over and above his just debts and liabilities, in property not by law exempt from execution, in this state.

(Signed) CHARLES S. OWENS.

Subscribed and sworn to before me this 17th day of April A. D. 1909. My commission expires Nov. 9, 1911.

(Signed) MAY STEWART,
[NOTARIAL SEAL.] *Notary Public.*

Endorsed: Appeal Bond. George A. Snow et al. to The Union Pacific Railroad Company. District Court. Filed Apr. 19, 1909. Arapahoe County, Colo. (Signed) Wm. H. Shea, Clerk. Approved this 19th day of April, 1909. (Signed) Wm. H. Shea, Clerk.

31 STATE OF COLORADO,
County of Arapahoe, ss:

Wm. H. Shea, Clerk of the District Court of Arapahoe County, State aforesaid, do hereby certify the above and foregoing to be a true, complete, and perfect transcript and copy of all the proceedings had and entered of record in a certain cause in said Court lately depending wherein Union Pacific Railroad Company was plaintiff and George A. Snow and R. W. Burton were defendants as the same now remains on file and of record in this office.

Witness my hand and seal of said Court, at the Court house in Littlet- County and State aforesaid, this 23rd day of July, A. D. 1909.

WM. H. SHEA, *Clerk.*

Filed in Supreme Court Sep. 14, 1909. James R. Killian, Clerk.

32 STATE OF COLORADO,
County of Arapahoe, ss:

In the District Court.

No. 198.

THE UNION PACIFIC RAILROAD COMPANY, Plaintiff,
v.
GEORGE A. SNOW and R. W. BURTON, Defendants.

Be it remembered, that on this 25th day of March A. D. 1909, the same being one of the regular juridical days of the March A. D. 1909

Term of said court, this cause coming on for trial to the court, before the Honorable Charles McCall, Judge of said court, a jury having been waived by both parties—

The plaintiff appeared by Clayton C. Dorsey, Esq., its counsel, and the defendants appeared by Charles R. Brock, Esq., their counsel.

Whereupon the following proceedings were had:

Mr. Brock: On behalf of the defendants I desire to object to the introduction of any testimony, and move to dismiss the complaint herein, upon the ground that said complaint states no cause of action against the defendants or either of them, and because it appears that there has never been any Congressional grant of any right of way at all to the plaintiff at the place in dispute, or—in any event, no grant of any right of way in excess of one hundred feet on either side of the center line of the plaintiff's track.

The said objection and motion were thereupon duly argued by counsel, and both the objection to the introduction of testimony and the motion to dismiss were overruled.

To which action of the court in each and both of said re-
33 spects the defendants and each of them, by their counsel, then and there duly excepted.

Without waiving any objection or exception hitherto made herein, and saving and excepting all objections on the ground of materiality or relevancy, it was stipulated in open court that witnesses for the plaintiff if present would testify and plaintiff's evidence purported to show as follows:

That the plaintiff is the successor in title to the Kansas Pacific Railway Company, formerly known as the Union Pacific Railroad Eastern Division, and before that known as the Leavenworth, Pawnee and Great Western Railroad Company of Kansas; and that said companies last named are the same companies mentioned in the several acts of Congress in the complaint referred to.

That said Kansas Pacific Railway Company did in the year 1870 construct its railroad from Kansas City to Denver, through, over and across the property described in the complaint; and that said railroad and the main track thereof is now in the same location in which it was at the time of the original construction, and ever since has been.

That the predecessor in title of the plaintiff herein complied in all particulars with the requirements of said various acts of Congress in said complaint mentioned.

That the plaintiff company is now the owner of the lands, if any, conveyed to said predecessor companies under and by virtue of said acts of Congress for a right of way.

That the parcel described in the complaint lies within a distance of two hundred feet from the center line of the main track of said railroad, but outside of a line one hundred feet from the center line of said main track.

That said railroad is a part of the railroad constructed from the Missouri river at the mouth of the Kansas river westward to a
34 connection with the main line of the Union Pacific as authorized by said acts of Congress.

That the same has been ever since its construction and is now continuously operated as a railroad, and its connection with the main line of the Union Pacific is at Cheyenne, Wyoming.

That the defendants herein did at the time of the commencement of this action and ever since have and do now detain from the plaintiff the possession of the premises described in the complaint, and that prior to the commencement of this action plaintiff demanded from the defendants the possession of the same.

This was all the testimony offered.

Mr. BROCK: On behalf of the defendants, Snow and Burton, I now move for a judgment as of non-suit, upon the ground that no right is shown, either by the complaint or the evidence offered, to any portion of the land in dispute.

The COURT: The motion is denied.

To which ruling of the court the defendants by their counsel then and there duly excepted.

Mr. BROCK: The defendants rest, without the introduction of any testimony, and I now move for judgment in favor of the defendants, upon the grounds stated in my motion to dismiss, and in the motion for judgment as of non-suit.

The COURT: The motion is denied.

To which ruling of the court the defendants by their counsel duly excepted.

Mr. DORSEY: I move for judgment in favor of the plaintiff.

The COURT: The judgment will be entered.

Mr. BROCK: To the judgment and to the entry thereof the defendants except. We now move the court to grant an appeal to the supreme court of the state of Colorado, and will ask the court
25 to fix the amount of a bond and the time for its execution and will also ask time for a bill of exceptions.

The COURT: The defendants are allowed thirty days from this date in which to file a bond in the penal sum of seven hundred and fifty dollars, the bond to be approved by the clerk of this court. The defendants are also allowed ninety days in which to prepare and tender a bill of exceptions.

The above and foregoing was all the evidence offered in the above entitled cause, and inasmuch as the above and foregoing matters and things do not fully appear of record in this cause the defendants hereby present this their bill of exceptions and pray that the same may be signed, sealed and made a part of the record of this cause.

Which is accordingly done this 20th day of April 1909.

CHARLES McCALL, *Judge*. [SEAL.]

Tendered this 20 day of April A. D. 1909.

CHARLES McCALL, *Judge*.

O. K. 19th day of April, 1909.

C. C. DORSEY,

Attorney for Plaintiff.

6951. Filed in Supreme Court Sep. 14, 1909. James R. Killian, Clerk.

36 In the Supreme Court of the State of Colorado.

GEORGE A. SNOW and ROBERT W. BURTON, Said Burton Doing Business as an Individual under the Name and Style of The Byers Mercantile Company, Appellants.

v.

UNION PACIFIC RAILROAD COMPANY, a Corporation, Appellee.

Assignment of Errors.

Come now the above named appellants by Milton Smith and Charles R. Brock their attorneys, and make the following assignment of errors, to wit:

(1) The court erred in overruling their demurrer to the complaint.

(2) The court erred in sustaining the demurrer of the appellee to their answer.

(3) The court erred in denying appellants' motion for a nonsuit.

(4) The court erred in holding that the appellee was entitled under the Congressional grant to any right of way in excess of one hundred (100) feet on either side of the center line of its track.

(5) The court erred in rendering judgment for appellee.

MILTON SMITH,
CHAS. R. BROCK,
Attorneys for Appellants.

6951 Filed in Supreme Court Sep. 11, 1909. James R. Killian, Clerk.

37 Be it remembered that on the 15th day of January, A. D. 1910, the same being one of the juridical days of the regular January A. D. 1910 term of said court, the following among other proceedings, were had and entered of record, to-wit:

No. 6951.

GEORGE A. SNOW et al., Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY, Appellee.

Appeal from the District Court of Arapahoe County.

and

No. 6952.

MARTIN V. SHOES et al., Appellants,

vs.

UNION PACIFIC RAILROAD COMPANY, Appellee.

Appeal from the District Court of Arapahoe County.

At this day, agreeable to the terms of a stipulation filed in the above entitled causes, it is considered and ordered by the Court that

said cases be consolidated for review in this Court, and that appellants be, and they are hereby, allowed until February 1st, next, within which to file their brief and argument; that appellee be, and it is hereby allowed ninety days thereafter in which to file its brief and argument; that appellants be, and they are hereby, allowed thirty days after receipt of appellee's brief in which to reply thereto.

And afterwards and on the 14th day of May, A. D. 1910, the same being one of the juridical days of the April A. D. 1910 term of said court, the following, among other proceedings, were had and entered of record, to-wit:

No. 6951.

GEORGE A. SNOW et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Appeal from the District Court of Arapahoe County.

At this day, agreeable to the terms of a stipulation filed in this cause, it is considered and ordered that appellee be, and it is
38 hereby, allowed until September 1st, next, in which to file its brief and argument herein.

And afterwards and on the 30th day of September, A. D. 1910, the same being one of the Juridical days of the regular September A. D. 1910 term of said court, the following among other proceedings were had and entered of record, to-wit:

No. 6951.

GEORGE A. SNOW et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Consolidated with

No. 6952.

MARTIN V. SIDES et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Appeals from the District Court of Arapahoe County.

At this day, in accordance with the terms of a stipulation filed in the above entitled causes, it is considered and ordered that said appellee be, and it is hereby, allowed until November 1st, next, in which to file its brief and argument herein.

nd afterwards and on the 2nd day of October, A. D. 1911, the e being one of the juridical days of the regular September A. D. l term of said court, the following, among other proceedings e had and entered of record, to-wit:

In the Matter of Transferring Cases to the Court of Appeals.

t this day, by virtue of an Act of the Eighteenth General As- bly of the State of Colorado, entitled "An Act in Relation to rts of Review," it is considered and ordered that the following cases now pending in this court on appeal be forthwith transferred to the Court of Appeals created by said Act, to-wit:

No. 6951.

GEORGE A. SNOW et al.
v.
UNION PACIFIC RAILROAD COMPANY.

Appeal from the District Court of Arapahoe County.

And afterwards and on the 11th day of November, A. D. 1911, l cause with all the pleadings in connection therewith, was re- l in the Supreme Court.

And afterwards, and on the 11th day of March, A. D. 1912, the e being one of the juridical days of the regular January A. D. 2 term of said court, the following, among other proceedings, e had and entered of record, to-wit:

No. 6951.

GEORGE A. SNOW et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Appeal from the District Court of Arapahoe County.

and

No. 6952.

MARTIN V. SIDES et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Appeal from the District Court of Arapahoe County.

At this day, in accordance with the terms of a stipulation filed in s cause, it is ordered that appellee be allowed until May 1st, next, which to file its brief and argument herein.

erwards and on the 11th day of June, A. D. 1912, the same
of the juridical days of the regular April, A. D. 1912
id court, the following among other proceedings were had
d of record in said court, to-wit:

No. 6951.

GEORGE A. SNOW et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

peal from the District Court of Arapahoe County.

and

No. 6952.

MARTIN V. SIDES et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

peal from the District Court of Arapahoe County.

AT this day, in accordance with the terms of a stipulation
l herein, it is ordered that appellee be allowed until July
next, in which to file its brief in the above entitled causes.

erwards and on the 2nd day of November, A. D. 1912, the
one of the juridical days of the regular September A. D.
of said court, the following, among other proceedings,
nd entered of record in said court to-wit:

No. 6951.

GEORGE A. SNOW et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

peal from the District Court of Arapahoe County.

and

No. 6952.

MARTIN V. SIDES et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

peal from the District Court of Arapahoe County.

day, in accordance with the terms of a stipulation filed in
entitled causes, it is ordered that said appellee be allowed

s brief and argument herein at this time, which is accordne.

fterwards and on the 27th day of November, A. D. 1912, a tipulation was filed in said court in this cause, of which the g is a true copy, to-wit:

In the Supreme Court of the State of Colorado.

No. 6951.

A. Snow and Robert W. Burton, Said Burton Doing ss as an Individual Under the Name and Style of The Mercantile Company, Appellants,

vs.

Pacific Railroad Company, a Corporation, Appellee.

Stipulation.

It is hereby stipulated by and between the parties hereto, y their respective attorneys:

at the appellants shall, and hereby do, expressly waive any errors or assignments of error based upon, arising from or to the third defense contained in the answer herein, or the pon the demurrer to said third defense, and said third de- hereby expressly withdrawn.

at the appellants shall, and hereby do expressly waive any errors or assignments of error based upon, arising from or to the counter-claim contained in the answer herein, or the pon the demurrer to said counter-claim, and said counter- hereby expressly withdrawn.

at in case this court shall reverse the action of the court respect to the order heretofore made overruling appellant's r to the complaint herein, the said appellee shall, and hereby t to stand upon and abide by said complaint as now drafted.

at in case this court shall reverse the ruling of the court sustaining appellee's demurrer to the second defense con- the answer herein, and shall determine that said demurrer have been overruled, the said appellee shall, and hereby ct to stand upon said demurrer, and decline to reply or e plead further to said second defense.

at this stipulation is made for the purpose of expediting the ermination of this controversy and saving unnecessary costs tigants, but is without prejudice to the right of either party e a review of the final judgment of this court, or of the District Court by appropriate proceedings in any court of ompetent jurisdiction.

MILTON SMITH,
CHAS. R. BROCK,
W. H. FERGUSON,
Attorneys for Appellants.
C. C. DORSEY,
E. I. THAYER,
Attorneys for Appellee.

Filed in Supreme Court, Nov. 27, 1912. James R. Killian, Clerk.

And afterwards and on the 27th day of November, A. D. 1912, the same being one of the juridical days of the regular September, A. D. 1912, term of said court, the following, among other proceedings, were had and entered of record in said court, to-wit:

No. 6951.

GEORGE A. SNOW et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Appeal from the District Court of Arapahoe County.

At this day come appellants, by Charles R. Brock, Esquire, their attorney, also comes Appellee, by Clayton C. Dorsey, Esquire, its attorney, and this cause is argued orally by counsel and submitted to the consideration and judgment of the Court.

And afterwards and on the 7th day of July, A. D. 1913, the formal opinion of the court in this matter was filed in the office of the Clerk of this Court, of which opinion the following is a true copy:

43 Filed in Supreme Court Jul- 7, 1913. James R. Killian, Clerk.

No. 6951.

GEORGE A. SNOW and ROBERT W. BURTON, said Burton Doing Business as an Individual under the Name and Style of The Byers Mercantile Company, Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, a Corporation, Appellee.

Appeal from the District Court of Arapahoe County.

Hon. Charles McCall, Judge.

Judgment reversed.

Mr. Milton Smith, Mr. Charles R. Brock, Mr. W. H. Ferguson, for Appellants.
Mr. W. W. Platt, of Counsel.
Mr. Clayton C. Dorsey, Mr. E. I. Thayer, Mr. N. H. Loomis, for Appellee.
Mr. Gerald Hughes, of Counsel.

Mr. Justice GARRIGUES delivered the opinion of the Court:

4 This is an action of ejectment brought by the Union Pacific Railroad Company. Judgment below was for plaintiff and defendants bring the case here on appeal.

1. In 1862 Congress passed an act granting to the Leavenworth, Pawnee & Western Railroad Company, and its successors in title, a 400 foot right of way through the public lands from the Missouri River, where Kansas City is now located, westerly in Kansas to the 100th meridian. In 1864, Congress amended the act of 1862 and authorized an extension of the road westerly from the 100th meridian to connect with the Union Pacific at any point desired, and provided the company that constructed the road should be entitled to all the benefits of the act. The Kansas Pacific, as successor in title, constructed the road westerly from the 100th meridian through Denver, and in 1870 connected it with the Union Pacific at Cheyenne. The Union Pacific is the successor in title of the Kansas Pacific, and when the latter built the road through the land, it was a part of the public domain. The only question tried in the lower court, was whether the right of way is 400 feet wide through this land. This question has been finally and definitely settled by the Supreme court of the United States in the late case of Stuart, et al. v. The Union Pacific Railroad Company, 33 Supreme Court Reporter, 538. It is there held that the 400 foot right of way through the public lands granted to the Leavenworth, Pawnee & Western Railroad Company from Missouri river to the 100th meridian by the act of 1862, was extended westerly by the act of 1864 to any point desired to connect the road with the Union Pacific; that the constructing company was entitled to all the benefits of the act; that a

5 right of way is a benefit, and the right of way granted was definitely located by the construction of the road to Cheyenne, and is 200 feet wide from the center line of the track through lands that were public, although never occupied and used to its full width.

The land in controversy was public land when the Kansas Pacific built through it and connected with the Union Pacific at Cheyenne. The Leavenworth, Pawnee & Western, was the predecessor in title of the Kansas Pacific, and the Union Pacific is the successor in title of the latter. It therefore follows from the final decision of the highest court of the land, by which, in this matter, we are bound, that the Kansas Pacific became vested by these acts of Congress with title to a right of way 400 feet wide through the land, and that the Union Pacific, its successor in title, is the owner of that right of way.

2. Defendants pleaded as a second defense, the seven years' statute of limitation, to which a general demurrer was sustained, and as to that issue, defendants elected to stand on the answer.

A jury was waived, and by consent the case was tried to the court on the issue raised by the complaint and the general denial. On the trial, defendants admitted that plaintiff's witness would testify that the Union Pacific is successor in title to the Kansas Pacific, formerly known as the Union Pacific Railroad Company, Eastern Division, and before that, known as the Leavenworth, Pawnee & Western,

which are the companies mentioned in the acts of Congress; that in 1870, the Kansas Pacific constructed the road from Kansas City through the land in question to Denver; that the main track is now located as it was at the time of construction; that the Kansas Pacific, as plaintiff's predecessor in title, complied with all the re-
46 quirements of the act of Congress; that the Union Pacific is now the owner of the lands granted by Congress for a right of way to the predecessor companies; that the parcel in dispute lies within 200 feet from the center line of the track, but outside a line 100 feet from the center line; that the line through the land is a part of the railroad constructed from the Missouri river at the mouth of the Kansas river westward to connect with the main line of the Union Pacific at Cheyenne; that the road was constructed as authorized by these acts of Congress, and that the defendants detain from the plaintiff the possession of the premises which, prior to the commencement of the action, it demanded from them.

The determination by the court of the facts upon the issue raised by the first defense was, as we have shown, in conformity with the decisions of the Supreme Court of the United States. The remaining question is whether the court erred in its ruling sustaining the company's demurrer to the second defense, which pleaded the statute of limitations. The district court in sustaining this demurrer followed the decisions of the United States Supreme Court. In Kindred v. U. P. R. R. Co., 168 Fed., 653, decided by the circuit court of appeals, it is said:

"It was conclusively determined by the act of Congress that a right of way 400 feet in width was essential to the performance of the public duties assumed by the grantee upon its acceptance of the grant. No part of that right of way could be alienated without the consent of Congress, nor lost by laches or acquiescence. It became in a sense a national public highway, and private encroachments upon it could be neither strengthened nor confirmed by lapse of time."

This case was appealed to the Supreme Court of the United States, Kindred v. U. P. R. R. Co., 225 U. S., 582, where on page 597, it is said:

"At an early stage of the case it appears to have been con-
47 tended that the appellants acquired title to parts of the right of way by adverse possession, but as the contention is expressly abandoned in the brief, evidently in view of the ruling in Northern Pacific Railroad Co. v. Smith, 171 U. S., 267, and Northern Pacific Railway Co. v. Ely, 197 U. S., 1, it need not be considered."

In Northern Pacific Railway Co. v. Ely, 197 U. S., at page 5, we find the following:

"On the fourth day of May, 1903, the decision of this court in Northern Pacific Railway Company v. Townsend, 190 U. S., 267, was announced. We there ruled that individuals could not for private purposes acquire by adverse possession, under a state statute of limitations, any portion of a right of way granted by the United States to a railroad company in the manner and under the conditions

hat the right of way was granted to the Northern Pacific Railroad Company."

In Northern Pacific Railway Co. v. Townsend, 190 U. S., at page 72, it is said:

"Congress having plainly manifested its intention that the title to nd possession of the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way annot be treated without overthrowing the act of Congress as forming the basis of an adverse possession which may ripen into a title good as against the railroad company."

So it is plain that prior to June 24, 1912, an individual could not equire title to any portion of the 400 foot right of way by the statute of limitations or adverse possession, and that the judgment of he lower court on this issue was correct. The judgment in the lower ourt was rendered in March, 1909, and the case was docketed here n September, 1909. June 24, 1912, while the case was pending here on appeal, Congress passed an act which among other things provides:

"That in all instances in which title or ownership of any part of aid right of way heretofore mentioned is claimed as against said orporations, or either of them, or the successors or assigns of any of hem, by or through adverse possession of the character and duration rescribed by the laws of the state in which the land is situated, such dverse possession shall have the same effect as though the land embraced within the line of said right of way had been granted by the United States absolutely or in fee instead of being granted as a right of way.

That any part of the right of way heretofore mentioned which as been, under the law applicable to that subject, abandoned as a ight of way is hereby granted to the owner of the land abutting hereon."

In November, 1912, supplemental briefs were filed by appellant's ounsel conceding that at the time of trial, title to no part of the right of way could be acquired by adverse possession or the statute of imitations. But it is now contended that the 1912 act of Congress emoves all restriction against acquiring title by the statute of limitations or adverse possession, not only as to the future but also regarding the past.

A majority of the court are of the opinion the 1912 statute applies o this case while here on appeal, which opinion is based on the following authorities:

United States v. Schooner Peggy, 1 Cranch., 103;
Cooley's Const. Lim., § 469, N. 5;
3 Cyc., 407;
Board v. Glover, 160 U. S., 170;
Same case on rehearing, 161 U. S., 101;
Dinsmore v. Company, 183 U. S., 115;
American Co. v. City, 119 Fed., 691;
Day v. Day, 22 Md., 530;

Price v. Nesbitt, 29 Md., 263;
Meloy v. Scott, 83 Md., 375;
Chesapeake Co. v. Western Co., 99 Md., 570;
Ferry v. Campbell, 110 Ia., 290;
Simpson v. Stoddard Co., 173 Mo., 421;
Vance v. Rankin, 194 Ill., 625;
K. P. Ry. Co. v. Twombly, 100 U. S., 78.

They are also of the opinion it is controlling, and the case should be reversed, and judgment entered here in favor of appellants.

The writer does not agree with the court as to that part of the opinion which decides that the statute of 1912 applies to this case here on appeal. I am of the opinion the case is here for the purpose of reviewing the judgment of the lower court, to reverse which, we must find prejudicial error. The judgment of the lower court
49 is in strict conformity with the decisions of the supreme court of the United States, and therefore, when rendered, was not erroneous. In my judgment, the cases cited do not support the opinion of the court. The leading case, U. S. v. Schooner Peggy, 1 Cranch., 103, has no similarity, and its reasoning cannot be applied to the facts and conditions here existing. That decision was based upon a treaty between the United States and France, and in the opinion the chief justice said:

"It is the general truth that the province of an appellate court is only to inquire whether a judgment when rendered, was erroneous or not. * * * It is true that in mere private cases a court will and ought to struggle hard against a construction which will, by retrospective operation, affect the rights of the parties."

The Maryland cases, in my opinion, are the only ones cited which are apparently in point, and they fairly illustrate a slavish adherence to precedent. They purport to be based on the Schooner case, and quote an isolated paragraph therefrom as authority for their contention, notwithstanding the case bears no similarity in fact or principle to those in which it is cited. It is a mis-application of a misconceived authority. The case of K. P. Ry. Co. v. Twombly, 100 U. S., 78, instead of supporting the opinion of the court, it seems to me to be directly contrary. It says in the syllabus, "Where no errors are found in the record, all this court can do, is to affirm the judgment." I am authorized to say that Mr. Justice Gabbert concurs in this view.

The judgment of the lower court is reversed, and judgment will be entered here in favor of appellants.

Reversed.

Decision en banc.

50 And afterwards, and on the said 7th day of July, A. D. 1913, the same being one of the juridical days of the regular April, A. D. 1913 term of said court, judgment was entered in harmony with the opinion announced, of which judgment the following is a true copy, to-wit:

No. 6951.

GEORGE A. SNOW et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Appeal from the District Court of Arapahoe County.

This cause having been brought to this Court by appeal to review the judgment of the District Court of Arapahoe County, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the Court that there is manifest error in the proceedings and judgment of said District Court,

It is therefore ordered and adjudged that the judgment of the said District Court be and the same is hereby, reversed, annulled, and altogether held for naught.

It is further ordered and adjudged by the Court that said appellee, being the plaintiff, take nothing by its said suit and that this action be and the same is hereby, dismissed out of court, and that said appellants, being the defendants, do have and recover of and from said appellee their costs of suit in said District Court, as well as in this Court, expended, and that execution issue therefor.

And let the opinion of the Court herein be published.

And afterwards and on the 18th day of July, A. D. 1913, appellee filed in the office of the Clerk of this court, its petition for a
51 writ of error from the United States Supreme — to this court, which petition is hereto attached.

52 Filed in Supreme Court, Jul- 18, 1913. James R. Killian, Clerk.

No. 6951.

Filed in Supreme Court, Jul- 18, 1913. James R. Killian, Clerk.

GEORGE A. SNOW and ROBERT W. BURTON, said Burton doing Business as an Individual under the Name and Style of The Byers Mercantile Company, Appellants.
vs.
UNION PACIFIC RAILROAD COMPANY, a Corporation, Appellee.

Petition for Writ of Error.

Union Pacific Railroad Company, Appellee in the above entitled cause, considering itself aggrieved by the final decision of the Supreme Court of Colorado in rendering judgment against it in said cause, and considering that manifold errors appear in the judgment and decision of said Supreme Court of Colorado, hereby respectfully prays a writ of error from the said decision and judgment to the

Supreme Court of the United States, and hereby requests an order fixing the amount of its bond, the same to operate as a supersedeas. Assignment of errors is filed herewith.

N. H. LOOMIS,
CLAYTON C. DORSEY,
Attorneys for Union Pacific Railroad Company.

GERALD HUGHES,
Of Counsel.

53 Filed in Supreme Court, Jul. 18, 1913. James R. Killian, Clerk.

STATE OF COLORADO,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by Union Pacific Railroad Company to said George A. Snow and Robert W. Burton, said Burton doing business as an individual under the name and style of The Byers Mercantile Company, in the sum of One thousand Dollars ($1,000.00), said bond to operate as a supersedeas.

Dated at Denver, Colorado, July 18th, 1913.

GEORGE W. MUSSER,
Chief Justice of the Supreme Court of Colorado.

53½ [Endorsed:] Court No. 6951. Div. —. In the Supreme Court of the State of Colorado. George A. Snow et al., Appellants, vs. Union Pacific Railroad Company, Appellee. Petition for Writ of Error. Hughes & Dorsey, Attorneys for Appellee. No. —.

54 And on the said 18th day of July, A. D. 1913, appellee also filed in the office of the Clerk of this Court, its assignments of error, which assignments of error are hereto attached.

55 Filed in Supreme Court Jul. 18, 1913. James R. Killian, Clerk.

In the Supreme Court of the State of Colorado.

No. 6951.

UNION PACIFIC RAILROAD COMPANY, a Corporation, Appellee Here, and Plaintiff in Error in the Supreme Court of the United States,

vs.

GEORGE A. SNOW and ROBERT W. BURTON, Said Burton Doing Business as an Individual under the Name and Style of The Byers Mercantile Company, Appellants Here, and Defendants in Error in the Supreme Court of the United States.

Assignment of Errors on Writ of Error from the Supreme Court of the United States.

Union Pacific Railroad Company, Appellee in the Supreme Court of the State of Colorado, and Plaintiff in Error in the Supreme Court

of the United States, files herewith its Petition for Writ of Error and says that there are errors in the record, proceedings and decision of the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States upon said Writ of Error said Union Pacific Railroad Company makes the following Assignment of Errors:

First. The Supreme Court of Colorado erred in deciding against and denying the title, right, privilege or immunity specially
56 set up and claimed by Union Pacific Railroad Company under the Statutes of the United States to-wit, the claim of said Union Pacific Railroad Company to a strip of land for right of way through the premises in controversy 400 feet in width, granted by the Pacific Railroad Acts of the United States as and for a right of way, to-wit, by the Act of July 1, 1862 (12 Stat. 489), entitled "An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to Secure to the Government the Use of the Same for Postal, Military and other Purposes;" the Act of July 2, 1864, amendatory thereof (13 Stat. 356); the further amendatory Act of July 3, 1866 (14 Stat. 79), and other acts of Congress amendatory thereof and supplemental thereto.

Second. The Supreme Court of Colorado erred in holding and deciding that under said acts of Congress Union Pacific Railroad Company was not the present owner of said strip of land 400 feet in width so granted as and for a right of way, thereby denying and deciding against the right and title of said Union Pacific Railroad Company thereunder, which had been and was specially set up and claimed.

Third. The Supreme Court of Colorado erred in holding and deciding that the Statutes of the State of Colorado relative to adverse possession were applicable to or effective against the right and title granted by said acts of Congress hereinabove mentioned.

Fourth. The Supreme Court of Colorado erred in holding and deciding that by reason of adverse possession, or by compliance with any statutes of Colorado relative thereto, the right and title
57 conferred by said acts of Congress had been or could be lost, diminished or in any manner affected or impaired.

Fifth. The Supreme Court of Colorado erred in holding and deciding that by virtue of the statutes of the State of Colorado relating to adverse possession, the Appellants in the Supreme Court of Colorado, Defendants in Error in the Supreme Court of the United States, or either thereof, became or were or are entitled to any portion whatsoever of said strip of land 400 feet in width, title and right to which was granted and conferred by said acts of Congress hereinabove mentioned.

Sixth. The Supreme Court of Colorado erred in holding and deciding that the Act of Congress, approved June 24, 1912, entitled "An Act Legalizing certain Conveyances heretofore made by the Union Pacific Railroad Company," had any application whatsoever to the instant case, upon the facts and circumstances admitted or conclusively shown by this record, and further erred in holding that by virtue of said Act of June 24, 1912, the title, right and privilege claimed by Union Pacific Railroad Company under said Pacific Rail-

road Acts, hereinabove mentioned, should be and was denied and decided against.

Seventh. The Supreme Court of Colorado erred in holding and deciding that said Act of Congress approved June 24, 1912, was or was intended to be retrospective in its operation or retroactive in effect, and so applicable to the instant case.

Eighth. The Supreme Court of Colorado erred in holding
58 and deciding that said Act of Congress approved June 24, 1912, was intended to give or did give the acts, transactions, omissions, conditions and circumstances occurring or existing prior to its passage a legal effect different from that which attached to them at the time they occurred, and so potent as to operate immediately and conclusively forthwith upon the passage and approval of said act of Congress, to deprive Union Pacific Railroad Company of the title theretofore vested in it under said Pacific Railroad Acts hereinabove mentioned, and to transfer said title to and confer the same upon said Appellants in the Supreme Court of the United States, thus authorizing and requiring the Supreme Court of Colorado, as it held and decided, to deny and decide against the right, title and privilege specially set up and claimed by Union Pacific Railroad Company under said Pacific Railroad Acts.

Ninth. The Supreme Court of Colorado erred in holding and deciding that said Act of Congress approved June 24, 1912, and entitled "An Act Legalizing certain Conveyances heretofore made by the Union Pacific Railroad Company," if retrospective in its operation or retroactive in effect, upon the facts, circumstances and conditions disclosed by this record (as said court held it was), was not in conflict with the Constitution of the United States, and particularly with those provisions thereof, specially set up by said Union Pacific Railroad Company, providing that "No person shall * * * be deprived of life, liberty or property without due process of law."

59 Tenth. The Supreme Court of Colorado erred in holding and deciding that said Act of Congress approved June 24, 1912, if given said retrospective and retroactive construction attributed to it by said court, was not in conflict with the provisions of the Constitution of the United States hereinabove mentioned, and in deciding against the right, privilege and immunity specially set up and claimed by said Union Pacific Railroad Company under the Constitution of the United States.

Eleventh. The Supreme Court of Colorado erred in holding and deciding that the Appellants in said court, Defendants in Error in the Supreme Court of the United States, were, and said Union Pacific Railroad Company, Appellee in said Court, and Plaintiff in Error in the Supreme Court of the United States, was not, the owners of the land in controversy.

Twelfth. The Supreme Court of Colorado erred in ordering, directing and entering judgment in favor of said Appellants, Defendants in Error in the Supreme Court of the United States, and against said Union Pacific Railroad Company, Appellee in that court, and Plaintiff in Error in the Supreme Court of the United States.

Wherefore, Union Pacific Railroad Company, Plaintiff in Error in the Supreme Court of the United States, prays that the judgment and decision of the Supreme Court of Colorado in the above entitled cause be reversed, and that a judgment be ndered in favor of said Union Pacific Railroad Company.

N. H. LOOMIS,
CLAYTON C. DORSEY,
Attorneys for Union Pacific Railroad Company.

GERALD HUGHES,
Of Counsel.

[Endorsed:] Court No. 6951. Div. —. In the Supreme Court of the State of Colorado. Union Pacific Railroad Company, Appellee, Plaintiff in Error vs. George A. Snow, et al., Appellants, Defendant- in Error. Assignment of Errors. Hughes & orsey, Attorneys for Plaintiff in Error. No. —.

And afterwards and on the said 18th day of July, A. D. 1913, a writ of error from the United States Supreme Court this Court was allowed by the Honorable George W. Musser, chief ustice of this Court, which order is hereto attached.

Filed in Supreme Court. Jul- 18, 1913. James R. Killian, Clerk.

In the Supreme Court of the State of Colorado.

No. 6951.

EORGE A. SNOW and ROBERT W. BURTON, Said Burton Doing Business as an Individual under the Name and Style of The Byers Mercantile Company, Appellants in the Supreme Court of Colorado, Defendants in Error in the Supreme Court of the United States.

vs.

NION PACIFIC RAILROAD COMPANY, a Corporation, Appellee in the Supreme Court of Colorado, Plaintiff in Error in the Supreme Court of the United States.

Order Allowing Writ of Error.

The writ of error from the Supreme Court of the United States the Supreme Court of the State of Colorado, this day applied for y Union Pacific Railroad Company, Appellee in this court and Plaintiff in Error in the Supreme Court of the United States, is ereby allowed.

Dated this 18th day of July, A. D. 1913.

GEORGE W. MUSSER,
Chief Justice of the Supreme Court of Colorado.

[Endorsed:] Court No. 6951. Div. —. In the Supreme Court of the State of Colorado. George A. Snow et al., Appellants, Defendants in Error, Plaintiff, vs. Union Pacific Railroad Company, Appellee, Plaintiff in Error, Defendant. Order allowing writ of error. Hughes & Dorsey, Attorneys for Plaintiff in Error. No. —.

63 And in accordance with the terms of the foregoing order allowing a writ of error, the appellee filed in this office its bond duly approved by the Chief Justice of this Court, of which bond, the following is a true copy:

In the Supreme Court of the State of Colorado.

No. 6951.

UNION PACIFIC RAILROAD COMPANY, a Corporation, Appellee in the Supreme Court of Colorado, Plaintiff in Error in the Supreme Court of the United States,

vs.

GEORGE A. SNOW and ROBERT W. BURTON, Said Burton Doing Business as an Individual under the Name and Style of The Byers Mercantile Company, Appellants in the Supreme Court of Colorado, Defendants in Error in the Supreme Court of the United States.

Bond on Writ of Error.

Know all men by these presents, that we, Union Pacific Railroad Company, a corporation, as principal, and National Surety Company *and* as sureties, are held and firmly bound unto George A. Snow and Robert W. Burton, said Burton doing business as an individual under the name and style of The Byers Mercantile Company, and their respective heirs, personal representatives and assigns, in the sum of one thousand dollars ($1,000), to be paid to said George A. Snow and said Robert W. Burton, said Burton doing business as an individual under the name and style of The Byers Mercantile Company, for which payment well and truly to
64 be made, we bind ourselves, our heirs, personal representatives and successors, jointly and severly, firmly by these presents.

Sealed with our seals and dated this 18th day of July, A. D. 1913.

Whereas, the above bounden Union Pacific Railroad Company, a corporation, as Plaintiff in Error, seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment and decision rendered in the above entitled action by the Supreme Court of the State of Colorado;

Now, therefore, the condition of this obligation is such, that if the above named Union Pacific Railroad Company, Plaintiff in Error in the Supreme Court of the United States, shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged and awarded if it shall fail to make good its plea

then this obligation to be void, otherwise to remain in full force and effect.

[SEAL.] UNION PACIFIC RAILROAD COMPANY,
By CLAYTON C. DORSEY,
Its Agent and General Attorney.
NATIONAL SURETY COMPANY,
By C. H. TANCRAY,
Attorney in Fact.

This bond approved this 18th day of July, A. D. 1913.
GEORGE W. MUSSER,
Chief Justice of the Supreme Court of Colorado.

Filed in Supreme Court Jul- 18, 1913. James R. Killian, Clerk.

65 And on said 18th day of July, A. D. 1913, there was filed in the office of the Clerk of this Court a writ of error issued in this matter, which writ of error is hereto attached.

66 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said the Supreme Court of the State of Colorado before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between George A. Snow and Robert W. Burton, said Burton doing business as an individual under the name and style of The Byers Mercantile Company, Appellants in said Supreme Court of Colorado, and defendants in the District Court of Arapahoe County, Colorado, and Union Pacific Railroad Company, a corporation, Appellee in said Supreme Court of Colorado, and plaintiff in said District Court of Arapahoe County, Colorado, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty,
67 statute, or commission; a manifest error hath happened to the great damage of the said Union Pacific Railroad Company, a corporation, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do com-

mand you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglas White, Chief Justice of the United States, the 18th day of July, in the year of our Lord one thousand nine hundred and thirteen.

[Seal United States District Court, District of Colorado.]

CHARLES W. BISHOP,
Clerk of the District Court of the United States for the District of Colorado.

Allowed, this 18th day of July, A. D. 1913.
GEORGE W. MUSSER,
Chief Justice of the Supreme Court of Colorado.

Filed in Supreme Court, Jul- 18, 1913, James R. Killian, Clerk.

[Endorsed:] Court No. —. Div. —. In the —— Court ——. Union Pacific Railroad Company, Plaintiff in error, vs. George A. Snow et al., Defendant- in Error. Writ of error. Hughes & Dorsey, Attorneys for Plaintiff in Error. No. —.

68 And on said 18th day of July, A. D. 1913, a citation was issued out of this court to the appellants herein, which was later returned and filed in this court with acknowledgment of service thereon, which citation is hereto attached.

69 UNITED STATES OF AMERICA,
State and District of Colorado, ss:

The President of the United States of America to George A. Snow and Robert W. Burton, said Burton doing business as an individual under the name and style of The Byers Mercantile Company, Greeting:

You and each of you are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Colorado, wherein Union Pacific Railroad Company is Plaintiff in Error and you are Defendants in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Colorado, this 18th day of July, A. D. 1913.

[Seal Supreme Court, State of Colorado.]

GEORGE W. MUSSER,
Chief Justice of the Supreme Court of Colorado.

Attest:
JAMES R. KILLIAN,
Clerk of the Supreme Court of Colorado.

Filed in Supreme Court. Jul- 18, 1913. James R. Killian, Clerk.

70 The undersigned, attorneys of record for the Defendants in Error in the above entitled cause, who were appellants before the Supreme Court of Colorado, hereby acknowledge due service of the above citation, and respectively enter appearance in the Supreme Court of the United States.

Dated July 18th, 1913.

MILTON SMITH,
CHARLES R. BROCK,
W. H. FERGUSON,
Attorneys for Defendants in Error.

Filed in Supreme Court. Jul- 18, 1913. James R. Killian, Clerk.

[Endorsed:] Court No. —. Div. —. In the —— Court ——. Union Pacific Railroad Company, Plaintiff in Error, vs. George A. Snow et al., Defendant- in Error. Citation. Hughes & Dorsey, Attorneys for Plaintiff in Error. No. —.

71 And afterwards and on the 18th day of July, A. D. 1913, appellee filed in the office of the clerk of this Court its precipe for a transcript of the record herein, of which precipe the following is a true copy:

No. 6951.

In the Supreme Court of the State of Colorado.

UNION PACIFIC RAILROAD COMPANY, a Corporation, Appellee in the Supreme Court of Colorado, and Plaintiff in Error in the Supreme Court of the United States,

vs.

GEORGE A. SNOW and ROBERT W. BURTON, Said Burton doing Business as an Individual under the Name and Style of The Byers Mercantile Company, Appellants in the Supreme Court of Colorado, and Defendants in Error in the Supreme Court of the United States.

Precipe for Transcript of Record on Writ of Error from the United States Supreme Court.

In accordance with Rule 8 of the Supreme Court of the United States, Union Pacific Railroad Company, Plaintiff in Error in said

court, Appellee in the Supreme Court of the State of Colorado, files this its præcipe, indicating the record to be incorporated in the transcript thereof for consideration by the Supreme Court of the United States on said writ of error, to-wit:

1. Complete record of the trial court, including final judgment, bill of exceptions, appeal orders and appeal bond.

2. Complete record of the Supreme Court of Colorado, including assignment of errors and all proceedings in the Supreme Court, including stipulation of the parties filed November 27, 1912, opinion of the court and final judgment;

3. All proceedings in the Supreme Court of Colorado subsequent to final judgment, including assignment of errors, petition,
72 " bond, writ of error, citation and all orders and other proceedings relating to said writ of error from the Supreme Court of the United States to said Supreme Court of Colorado, including also this præcipe.

N. H. LOOMIS,
CLAYTON C. DORSEY,
Attorneys for Union Pacific Railroad Company, Plaintiff in Error in the Supreme Court of the United States.

GERALD HUGHES,
Of Counsel.

The undersigned, attorneys and of counsel for the appellants in the Supreme Court of Colorado, who are Defendants in Error in the Supreme Court of the United States, acknowledge service of a copy of the foregoing præcipe this 18th day of July, A. D. 1913, and hereby stipulate that the matters and things therein designated will constitute a complete transcript of the entire record and proceedings of the trial court upon which the cause was determined by the Supreme Court of Colorado, and also a complete transcript of the entire record of said Supreme Court of Colorado, including all of the evidence offered, received or considered in either of said courts in arriving at the final determination of said cause, and do further stipulate that the same shall constitute the transcript of the record to be transmitted to the Supreme Court of the United States on said Writ of Error.

MILTON SMITH,
CHARLES R. BROCK,
W. H. FERGUSON,
Attorneys and of Counsel for the Appellants in the Supreme Court of Colorado, who are Defendants in Error in the Supreme Court of the United States.

Filed in Supreme Court, Jul- 18, 1913. James R. Killian, Clerk.

73 STATE OF COLORADO, *ss:*

In the Supreme Court.

No. 6951.

GEORGE A. SNOW et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

I, James R. Killian, Clerk of the Supreme Court of the State of Colorado, do hereby certify that the foregoing transcript contains a true copy of the original transcript of the record filed in my office on appeal; all orders of this court entered in this matter; the stipulation as to pleadings filed on the 27th day of November, A. D. 1912; the formal opinion of the Court; the original petition for writ of error; the original assignments of error; the original order allowing such writ of error; the original bond filed pursuant to said order; the original citation issued; and a copy of the præcipe under which this transcript is prepared. All of which appears in the records of this Court.

In witness whereof, I have hereunto set my hand as Clerk of this Court and affixed the seal thereof at the City of Denver, State of Colorado, this 29th day of July, A. D. 1913.

[Seal Supreme Court, State of Colorado.]

JAMES R. KILLIAN.
Clerk of the Supreme Court of the State of Colorado.

Endorsed on cover: File No. 23,833. Colorado Supreme Court. Term No. 682. Union Pacific Railroad Company, plaintiff in error, vs. George A. Snow and Robert W. Burton (said Burton doing business as an individual under the name and style of The Byers Mercantile Company). Filed August 15th, 1913. File No. 23,833.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 683.

UNION PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

MARTIN V. SIDES AND WALTER W. SCHERRER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

FILED AUGUST 15, 1913.

(23,834)

(23,834)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 683.

UNION PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

MARTIN V. SIDES AND WALTER W. SCHERRER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

INDEX.

UNITED STATES OF AMERICA,
Supreme Court of Colorado, ss:

In obedience to the commands of the within writ, I herewith submit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Colorado, in the City of Denver, this 31st day of March, A. D. 1913.

[Seal Supreme Court, State of Colorado.]

JAMES R. KILLIAN,
Clerk Supreme Court of Colorado.

Cost of this transcript, $29.60.

No. 6952.

UNITED STATES OF AMERICA,
State of Colorado:

In the Supreme Court.

Be it remembered that on the 14th day of September, A. D. 1909, there was filed in said Supreme Court a transcript of record, of which transcript the following is a true copy, to-wit:

District Court, County of Arapahoe, First Judicial District.

STATE OF COLORADO,
County of Arapahoe:

Cause in the District Court of the County of Arapahoe, State of Colorado, before the Hon. Charles McCall, Judge of the First Judicial District of the said State, at a term thereof begun and held at the Court House in Littleton, in said County, on the first Tuesday (it being the 2nd day) of March, A. D. one thousand Nine Hundred and nine.

Present:

Hon. Charles McCall, Judge of the District Court.
Walter M. Morgan, Esq., District Attorney of said District.
Joseph A. Skerritt, Esq., Sheriff of said County.
Wm. H. Shea, Esq., Clerk of said Court.

6952 Filed in Supreme Court Sep. 14 1909. James R. Killian, Clerk.

3 UNION PACIFIC RAILROAD COMPANY, a Corporation,
vs.
MARTIN V. SIDES and WALTER W. SCHEERER.

Be it remembered, that heretofore, and on to-wit the 9th day of May, A. D. 1908, came the plaintiff and filed herein its complaint, and said complaint is in words and figures as follows, to-wit:

STATE OF COLORADO,
County of Arapahoe, ss:

In the District Court.

UNION PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
MARTIN V. SIDES and WALTER W. SCHEERER, Defendants.

Complaint.

Now comes the plaintiff above named, and for cause of action alleges:

First. That the plaintiff is now and at all times with reference to which it is hereinafter mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and is and was at all of said times a railroad company, carrying on the business of transporting freight and passengers between points situated in different states, and a common carrier thereof for hire, and engaged in the business of interstate commerce, as an instrumentality thereof.

Second. That the plaintiff herein, at the time of the commencement of this action, and for a long time prior thereto, was, ever since has been, and now is the owner in fee simple and entitled to the exclusive possession of each and every part of a certain tract
4 of land, situate, lying and being in the County of Arapahoe, State of Colorado, which tract of land is a part of the East one-half (E. ½) of the Southeast quarter (S. E. ¼), of Section eight (8), Township four (4) South, Range sixty-one (61) West, and is more particularly described as follows, to-wit:

Beginning at a point on the east boundary line of Section eight (8), Township four (4) South, Range sixty-one (61) West, which is ninety (90) feet distant southwesterly from and at right-angles to the center line of the main track of Union Pacific Railroad Company, the plaintiff herein; thence northwesterly along a line ninety (90) feet from and parallel with the center line of said main track, a distance of one hundred and fifty (150) feet to a point; thence southwesterly and at right angles to the center line of said main track, a distance of sixty (60) feet to a point; thence southeasterly along a line one hundred and fifty (150) feet from and parallel with the center line of said main track, a distance of one hundred sixty-two and one-half (162½) feet, more or less, to the east boundary

id section; thence north along said east boundary line of
n, to the place of beginning.
id premises are a portion of a tract of land four hundred
t in width, being two hundred (200) feet on each side of
r of the track of Union Pacific Railroad Company as the
ses said East one-half (E. ½) of the Southeast quarter
) hereinabove mentioned, which said tract is a part of a
s tract of land of like width granted to the predecessors in
e plaintiff herein as and for a right of way for a line of
and telegraph, extending from a point on the Missouri
the State of Missouri where Kansas City is now located,
what is now the States of Kansas, Colorado and Wyoming,
ugh the City of Denver, and to a connection with the main
nion Pacific Railroad Company at Cheyenne, in Wyoming,
d by virtue of a certain Act of Congress entitled "An Act to
e construction of a railroad and telegraph line from the
River to the Pacific Ocean, and to secure to the Government
e use of the same for Postal, military and other purposes,"
proved July 1st, 1862, and the subsequent acts of Congress
mendatory thereof and supplemental thereto; that the prede-
title to plaintiff accepted said Acts and the grant thereby
complied with all of the conditions thereof, and that one
es of railroad and telegraph contemplated by said Acts of
and constructed thereunder, and in reference to which said
a strip of ground four hundred (400) feet in width was
s laid and constructed across the said East one-half (E. ½)
outheast quarter (S. E. ¼) hereinabove described, and ever
been and now is continuously operated as a railroad and
line by the plaintiff herein and its said predecessors in
that each and every part of said strip of land four hundred
in width, as the same passes through said East one-half
f said Southeast quarter (S. E. ¼), at all of the times men-
rein was and is now necessary for the uses of plaintiff herein
arious predecessors in title, for the purposes mentioned in
of Congress, and for which said grant was made; that prior
ommencement of this action, plaintiff herein, by various
nveyances, became the owner of said railroad and telegraph
of said premises first hereinabove described as a portion of
of ground four hundred (400) feet in width, and ever
been and now is entitled to the possession thereof, and of
every part of the same.

That the defendants herein have wrongfully ousted the
and its predecessors in title from said premises first herein-
ecifically described as a portion of said four hundred (400)
, and while plaintiff or its predecessors in title were right-
lly in possession and entitled to possession of the same, and
ver since have and now do wrongfully withhold possession
ereof from the plaintiff.

he defendant Martin V. Sides wrongfully claims ownership,
tiff is informed and believes, in fee simple of all of said
first hereinabove specifically described, and wrongfully

claims the right of possession of all thereof, and is himself in the actual possession thereof, either in person or through his tenant, lessee or licensee, as hereinafter more particularly mentioned, and wrongfully withholds the same from the plaintiff.

Fourth. That the defendant Walter W. Scherrer, as tenant, lessee or licensee of said defendant Sides, wrongfully claims, as plaintiff is informed and believes, the possession and right of possession, and is in the actual possession, by, under and through wrongful leave, license and consent of the defendant Sides, and wrongfully withholds from the plaintiff some part or portion of the premises first hereinabove specifically described, the exact boundaries of which part or portion plaintiff is unable to state with accuracy.

Fifth. Plaintiff further alleges that by reason of said wrongful ouster and said wrongful possession by defendants, and said wrongful withholding of said possession from the plaintiff by defendants, plaintiff has been damaged in the sum of two thousand five hundred ($2,500.) dollars.

Wherefore, plaintiff prays that it may be adjudged to be the owner in fee of the premises hereinabove specifically described, and entitled to the immediate possession of the same, and each and every part thereof; that it may have judgment of ouster against the defendants, and each of them, and special execution in the nature of a writ of possession against said defendants, and each of
7 them, directing the sheriff to put the plaintiff into immediate and complete possession thereof; that the plaintiff may recover judgment against said defendants in the sum of two thousand five hundred ($2,500.) dollars, and for its costs in this behalf expended, and for such other further and different relief as to the court may seem meet and just in the premises.

(Signed) DORSEY & HODGES,
Attorneys for Plaintiff.

STATE OF COLORADO,
City and County of Denver, ss:

Clayton C. Dorsey, being first duly sworn, on his oath deposes and says: That *is* is one of the attorneys for the above named plaintiff; that said plaintiff is a corporation, and for that reason he makes this verification in its behalf; that he has read the foregoing complaint and knows the contents thereof, and that the same is true to the best knowledge and belief of affiant.

(Signed) CLAYTON C. DORSEY.

Subscribed and sworn to before me this 9th day of May, A. D. 1908.

My commission expires Oct. 16, 1909.

(Signed) EWALD W. HEINEMANN,
[NOTARIAL SEAL.] *Notary Public.*

Endorsed: No. 199. In the District Court of Arapahoe County, Colo. Union Pacific R. R. Co., Plaintiff, vs. Martin V. Sides and Walter W. Scherrer, Defendants. District Court. Filed May 9,

1908, Arapahoe County, Colo. (Signed) Edward H. Albertson, Clerk. Dorsey & Hodges, Attorneys for plaintiff.

And thereupon summons issued out of said court directed to the said defendants, and said summons is in words and figures as follows, to-wit:

STATE OF COLORADO,
County of Arapahoe, ss:

In the District Court.

UNION PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff.
vs.
MARTIN V. SIDES and WALTER W. SCHERRER, Defendants.

Summons.

The People of the State of Colorado to the defendants above named. Greeting:

You are hereby required to appear in an action brought against you by the above named plaintiff, in the District Court of the County of Arapahoe, State of Colorado, and answer the complaint therein within twenty days after the service hereof, if you are served within this County; if served out of this County, or by publication, within thirty days after service hereof exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint.

If a copy of the complaint be not served upon you herewith, or if service hereof be made out of the State of Colorado, ten days additional time to that above specified shall be allowed for your appearance and answer in said action.

This is an action brought by the plaintiff, Union Pacific Railroad Company, to recover the possession of a certain tract of land situate in the county of Arapahoe, State of Colorado, which said tract of land is a part of East half ($E\frac{1}{2}$) of the southeast quarter ($SE\frac{1}{4}$) of section 8, Township 4 south range 61 West, and part of the Union Pacific right of way at or near the town of Byers, State of Colorado. The plaintiff claims ownership in fee in said tract of land, and the immediate possession thereof, and prays for judgment of ouster against each and all of the defendants above named, writ of possession, and damages in the sum of $2,500 for unlawful ouster and detention of possession, for costs of this suit and such further relief as to the Court may seem proper in the premises. For a more perfect description of the lands claimed, see complaint hereto attached.

Witness, Edward H. Albertson, Clerk of said Court, with the seal thereof hereunto affixed, at office, in the Town of Littleton, this 9th day of May, A. D. 1908.

[SEAL.] (Signed) EDWARD H. ALBERTSON, *Clerk.*

STATE OF COLORADO,
County of Arapahoe, ss:

I do hereby certify that I have duly executed the within summons this 9th day of May A. D. 1908, by delivering to the within named defendants (personally) a true copy of the within summons and complaint to Martin V. Sides and Walter W. Scherrer.

(Signed) GEORGE E. BEACH, *Sheriff.*
By F. M. WEDOW.

(Endorsed:) Summons. District Court County of Arapahoe. Filed in District Court May 12th, 1908. (Signed) Edward H. Albertson, Clerk.

10 And afterwards, and on to-wit, the 29th day of May, 1908, the defendants, by their attorneys, filed herein their demurrer, and said demurrer is in words and figures as follows, to-wit:

STATE OF COLORADO,
County of Arapahoe, ss:

In the District Court.

UNION PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
MARTIN V. SIDES and WALTER W. SCHERRER, Defendants.

Demurrer.

Comes now Martin V. Sides, one of the defendants above named, by his counsel, and demurs to the complaint in the above entitled cause, and for ground of said demurrer shows:

1. That the complaint does not state sufficient facts to constitute a cause of action against this defendant.

(Signed) THOS. H. HARDCASTLE,
Attorney for Defendant Martin V. Sides.

Received, Denver, Colorado, May 28, 1908, a copy of the above demurrer.

(Signed) DORSEY & HODGES,
Attorneys for Plaintiff.

(Endorsed:) No. 199. In the District Court of Arapahoe County, State of Colorado. Union Pacific Railroad Company, Plaintiff, vs. Martin V. Sides and Walter W. Scherrer, Defendant. Demurrer. Thomas H. Hardcastle, Attorney for Defendants. District Court. Filed May 29th 1908. (Signed) Edw. H. Albertson, Clerk.

11 And afterwards and on to-wit *on* the 2nd day of June 1908 the defendant Walter W. Scherrer filed his answer herein which is in words and figures as follows to-wit:

Answer.

STATE OF COLORADO,
County of Arapahoe, ss:

For answer to complaint in the above entitled cause the defendant Walter W. Scherrer says:

I. That this defendant Walter W. Scherrer, is not in possession, actual or constructive, of the lands and premises mentioned in the complaint, or any part thereof and that this defendant does not own or claim any right interest or title in sa-d lands and premises whatsoever; and this defendant denies that he with-olds from the plaintiff some part or portion of said land and premises, or any part or portion thereof. Therefore, having fully answered said complaint this defendant prays that he may be hence dismissed, with his costs to be taxed in this behalf most unjustly expended.

(Signed) THOS. H. HARDCASTLE,
Attorney for Walter W. Scherrer.

STATE OF COLORADO,
County of Arapahoe, ss:

Walter W. Scherrer, being first duly sworn on solemn oath deposes and says: I am the defendant above named and I have read the foregoing answer and know the contents thereof and the same is true of my own knowledge.

(Signed) WALTER W. SCHERRER.

Subscribed and sworn to before me this 28th day of May A. D. 1908.

My notarial commission expires November 8, 1911.

[SEAL.] (Signed) ROBERT W. BURTON,
Notary Public.

12 Endorsed: No. 199. In the District Court of Arapahoe County, State of Colorado. Union Pacific Railroad Company, Plaintiff, vs. Martin V. Sides and Walter W. Scherrer, Defendants. Answer. Thomas H. Hardcastle, Attorney for Defendants. District Court. Filed June 2nd, 1908. Arapahoe County, Colo. Edward H. Albertson, Clerk.

And afterwards, and on to-wit, the 6th day of November, 1908, the same being one of the regular juridical days of the November term, A. D. 1908, of said Court the following proceedings were had and entered of record in said case, to-wit:

THE UNION PACIFIC RAILROAD COMPANY, a Corporation,
vs.
MARTIN V. SIDES and WALTER W. SCHERRER.

Now on this day this cause coming on regularly to be heard, upon motion of counsel,

It is ordered by the court that this cause be continued to November 30th, 1908, at 10:30 o'clock in the forenoon.

And afterwards, and on to-wit, the 30th day of November, 1908, the same being one of the regular juridical days of the November term, A. D. 1908, of said court, the following proceedings inter alia, were had and entered of record in said court, to-wit:

UNION PACIFIC RAILROAD COMPANY, a Corporation,
vs.
MARTIN V. SIDES and WALTER W. SCHERRER.

At this day come the parties hereto by their attorneys
13 respectively, and thereupon this cause coming on to be heard upon the demurrer of said defendant, Martin V. Sides to the complaint herein, it argued by counsel, and the Court being fully advised.

It is ordered by the Court That the demurrer of defendant is hereby overruled, and he is given twenty days in which to answer.

And afterwards, and on to-wit, the 30th day of December, A. D. 1908, came the defendant Martin V. Sides, and filed his answer to the complaint herein, and said answer is in words and figures as follows, to-wit:

STATE OF COLORADO,
County of Arapahoe, ss:

UNION PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
MARTIN V. SIDES and WALTER W. SCHERRER, Defendants.

Answer.

Comes now Martin V. Sides, one of the Defendants above named, and for answer to the complaint in the above entitled action, says:

For the First Defense.

That he admits the allegations contained in the first paragraph of the Complaint but denies each and every other allegation in the said complaint alleges; and this defendant Martin V. Sides, alleges that he is the owner and that for more than thirty years last past his predecessors in title have been the owners of that certain part of the East one-half (½) of the South East one-quarter (¼) of section Eight (8) Township Four (4) South, Range Sixty-one (61)
West, described as follows:

14 Commencing at a point one hundred (100) feet from the center of the Union Pacific railroad track on the line between sections Eight (8) and Nine (9), Township Four (4) South, Range sixty-one (61) West, thence South on said line Fifty (50) feet; thence West One hundred (100) feet; thence North fifty (50) feet; thence East one hundred (100) feet from the place of beginning, and that the said parcel of land is a part of the same land described and mentioned in the complaint herein, but that as to

that certain strip of land ten (10) feet wide beginning ninety (90) feet from the center of the track of the Union Pacific Railroad Company, as mentioned and described in said complaint, and extending up to the distance of 100 feet from the center of said track, being a strip of land 10 feet wide and 50 feet long; that as to said strip this defendant does not claim and has not claimed any right, title or interest therein. And that the parcel of land claimed by the defendant is all of it situated 100 feet or more from the center of the track of the said Union Pacific Railroad Company.

Second Defense.

That subsequent to the act of Congress referred to in the complaint as having been approved July 1, 1862, and prior to the time when the corporation by said act created, its successors or assigns, took any steps thereunder to establish or construct any line of railroad, it was declared by a certain other act of congress, approved in 1864, which was amendatory of the aforesaid act approved July 1, 1862, that two hundred (200) feet in width, and no more, should constitute the right of way of any railroad which might be constructed under the authority of the said act approved July 1, 1862, and the subsequent acts amendatory thereof; that the said act provided and contemplated that the said right of way should consist of one hundred (100) feet on either side of the center line of the railroad track when established and constructed; that the property in the complaint described and now in the possession of these defendants is more than one hundred (100) feet from the center line of the plaintiff's track, and neither the plaintiff nor any of its predecessors has ever at any time been in possession or occupation of any portion thereof, nor has the plaintiff or any of its predecessors ever used or occupied the same or any portion thereof for railroad or other purposes; that the plaintiff does not now, nor has it or any of its predecessors ever at any time in the past needed or required the said parcel of land or any portion thereof for railroad purposes; that these defendants, and those under and through whom they claim title, acquired said title under and by virtue of a patent from the United States of America, which issued on November 5, 1878, and various mesne conveyances, thereafter duly executed, and under such right they have been in the open, notorious, continuous, peaceable, undisturbed and undisputed adverse possession of all of the property in the complaint described, during all of the period of time that has elapsed since the date of the issuance of the patent as aforesaid, which is more than the full period of seven years next before the institution of this action, and during all of the said period of time these defendants and their predecessors have paid and caused to be paid all taxes which have been assessed against said property. And these defendants now plead and rely upon the statute of limitation of the State of Colorado in such cases made and provided in bar of this action.

16 Third Defense.

That any right received or required by the corporation which was created by the congressional act approved July 1, 1862, in the complaint mentioned, or by the successors or assigns of said corporation, in or to the property in the complaint described, was at most the grant or a limited fee, which grant was made on the condition that said property should revert to the United States, or to its assigns, in the event that said corporation should fail for a reasonable time actually to appropriate and use the said land for railroad purposes, or should thereafter cease to use the said land for such purposes; that thereafter, and before the said land in the complaint described, or any thereof, was ever used or occupied by said corporation, its successors or assigns, or by any one, for railroad purposes, the right of reverter which was retained in the United States at the time of the passage of the act of Congress approved July 1, 1862, was conveyed, transferred and assigned by the United States to these defendants and their grantors; that this was done by a patent which was granted by the United States to the vendor of these defendants in the year A. D. 1878; that neither the said corporation so organized as aforesaid nor any of its successors or assigns ever at any time, whatever, took possession of, used or occupied the land in question, or any thereof, for railroad purposes, or for any purpose, whatever; that said corporation so organized as aforesaid, its successors and assigns, failed for a reasonable time, and altogether failed, to use or occupy the said land or any thereof for railroad purposes, and on account of such failure the said corporation,
17 its successors and assigns, lost any and all right thereto which may have been granted by said act of Congress, and the whole of the property in the complaint described as being in the possession of these defendants reverted to the United States and to these defendants as the assignees of the United States; that the whole of said property in the possession of these defendants is situate more than one hundred (100) feet from the center line of the plaintiff's railroad track; that neither the plaintiff nor any of its predecessors ever needed the said property or any thereof for railroad purposes, and the plaintiff does not now need the same or any thereof for such purposes. That on account of the failure as aforesaid of the plaintiff and its predecessors to use or occupy the said land for railroad purposes for a period which now approximates fifty (50) years next ensuing after the approval of the congressional act of 1862, the limited fee which may have been granted to the predecessor of the plaintiff by said act, ceased and determined, and the whole of said property so unused and unoccupied reverted to the United States and its grantees, and any and all right which the plaintiff or its predecessors may have acquired ceased and forever determined.

Counter Claim.

For further answer, and by way of counter-claim against the plaintiff, these defendants allege that the particular parcel of land

the complaint sought to be recovered, exclusive of the improvements thereon, which these defendants and their vendors have constructed, is worth not exceeding the sum of two hundred dollars ($200); that many years ago these defendants and their vendors constructed on said parcel of land buildings and improvements of the reasonable value of fifteen hundred dollars ($1,500); that said land, together with said improvements, is now worth, and at the institution of this action was worth, the sum of not exceeding fifteen hundred dollars ($1,500); that the said building and improvements were first constructed on said property more than twenty years ago, and this was done with the full knowledge and notice of the plaintiff, and without any objections or protest on its part, and without the assertion of any claim, whatever, on the part of the plaintiff that it has any interest in or right to the said land; that neither the plaintiff nor its predecessors ever at any time used or occupied the said land or any thereof for railroad purposes or for any purposes, whatever; that by an act of Congress many years ago duly enacted and approved, it was declared that one hundred (100) feet on either side of the center line of the track of the road of the plaintiff and its predecessors is all of the land that is necessary or proper for the right of way of its road; that for a period of more than thirty (30) years next before the institution of this action these defendants and their vendors have been in the open, notorious, continuous, peaceable, undisturbed and undisputed adverse possession of all of the property by the complaint sought to be recovered, and have placed as aforesaid valuable and existing improvements upon said property, and during the said period of time the issues, rents, and profits of said land itself, apart from the buildings, did not amount to anything at all, and was of no value, whatever; that for these defendants at this time to be deprived of the use, possession occupation and ownership of said premises without reimbursement for the improvements which they have placed thereon, will entail upon them damage in the sum of not less than fifteen hundred dollars ($1,500.)

Wherefore, the defendants, having fully answered, pray that they may be hence dismissed, with judgment for their costs in this behalf expended to be taxed; or, if the said property should be adjudged to the plaintiff, then and in that event the defendants pray that this shall be done only upon condition that the plaintiff shall, within a time to be designated by this court, pay into the registry thereof for the benefit of the defendants, the sum of fifteen hundred dollars ($1,500.), as the value of the improvements constructed upon the said property by these defendants, and finally, they pray for all proper relief.

(Signed) THOS. H. HARDCASTLE,
Attorney for Martin V. Sides, Def't.

STATE OF COLORADO,
City and County of Denver, ss:

Thomas H. Hardcastle of the City and County of Denver, being first duly sworn on oath deposes and says, I am the attorney for

Martin V. Sides, the defendant, above named; I drafted the foregoing answer and counter-claim, and know the contents thereof, and the same is true to the best of my information, knowledge and belief, and I make this affidavit in behalf of the said Martin V. Sides, the said defendant, because he is absent from the City and County of Denver, where I reside.

(Signed) THOS. H. HARDCASTLE.

Subscribed and sworn to before me this 30th day of December, A. D. 1908.

My notarial commission expires March 25th, 1912.

(Signed) J. DEMING PERKINS, JR.,
[NOTARIAL SEAL.] *Notary Public.*

20 (Endorsed:) No. 199. In the District Court of the County of Arapahoe, State of Colorado. The Union Pacific Railroad Co., Plaintiff, vs. Martin V. Sides and Walter W. Scherrer, Defendants. Answer of Martin V. Sides. Thomas H. Hardcastle, Attorney for Martin V. Sides, Defendant. District Court. Filed Dec. 30, 1908. Arapahoe County, Colo. (Signed) E. H. Albertson, Clerk.

And afterwards, and on, to-wit, the 11th day of January, A. D. 1909, came the plaintiff and filed its demurrer to defendant Martin V. Sides' answer, and said demurrer in in words and figures as follows, to-wit:

STATE OF COLORADO,
County of Arapahoe, ss:

In the District Court.

UNION PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
MARTIN V. SIDES and WALTER W. SCHERRER, Defendants.

Demurrer.

Now comes the plaintiff above named, and demurring to the answer of Martin V. Sides heretofore filed herein—

I.

Demurs to the second defense contained in said answer, for the reason that the same does not state facts sufficient to constitute a defense to this action.

II.

Demurs to the third defense contained in said answer, and
21 for ground of such demurrer shows unto the court that said third defense does not state facts sufficient to constitute a defense to this action.

III.

Demurs to the counterclaim contained in said answer, and for ground of such demurrer shows unto the court that said counterclaim does not state facts sufficient to constitute a counter-claim, set-off or a defense, in whole or in part, to the cause of action set up in the complaint herein.

(Signed) DORSEY & HODGES,
Attorneys for Plaintiff.

(Endorsed:) No. 199. In the District Court. County of Arapahoe. Union Pacific Railroad Company, a corporation, Plaintiff, vs. Martin V. Sides and Walter W. Scherrer, Defendants. Demurrer. District Court. Filed Jan. 11, 1909. Arapahoe County, Colo. (Signed) Wm. H. Shea, Clerk. Dorsey & Hodges, Attorneys for plaintiffs.

And afterwards, and on, to-wit, the 6th day of February, A. D. 1909, at Chambers, in Golden, Jefferson County, Colorado, the following proceedings were had and entered of record, as follows, to-wit:

STATE OF COLORADO,
Arapahoe County, ss:

In the District Court.

No. 199.

THE UNION PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
MARTIN V. SIDES et al., Defendants.

Ejectment.

22 At this day come the parties hereto, by their attorneys, respectively. And thereupon this cause coming on to be heard upon the demurrers of the plaintiff to the second and third defenses, and also to the demurrer of the plaintiff to defendant's counterclaim, are argued by counsel, and being now sufficiently advised in the premises, it is ordered that each and every of said demurrers be and they are hereby sustained. Defendant is given ten days to further plead.

Done at Golden, Jefferson County, at Chambers, this 6th day of February, A. D. 1909.

(Signed) CHARLES McCALL, *Judge.*

And afterwards, and on, to-wit, the 2nd day of March, 1909, the same being one of the regular juridical days of the March Term, 1909, of said court, the following proceedings, inter alia, were had and entered of record in said court, to-wit:

UNION PACIFIC RAILROAD COMPANY

vs.

MARTIN V. SIDES et al.

Now on this day this cause coming on regularly to be heard, it is ordered by the court that this cause be set for trial on March 16th, at the hour of 10:00 o'clock in the forenoon.

And afterwards, and on, to-wit, the 12th day of March, 1909, the same being one of the regular juridical days of the March Term of said Court, the following proceedings, inter alia, were had and entered of record in said Court

UNION PACIFIC RAILROAD COMPANY

vs.

MARTIN V. SIDES et al.

Now on this day the Court being fully advised, doth upon its own motion order that the order heretofore entered setting
23 the above entitled cause for trial on March 16, 1909, be and it is hereby vacated, and it is ordered that this cause be set for trial on March 26, 1909, at the hour of 1:30 o'clock in the afternoon.

And afterwards and on, to-wit, the 26th day of March, 1909, the same being one of the regular juridical days of the March Term, 1909, of said Court, the following proceedings, inter alia, were had and entered of record in said Court, to-wit:

UNION PACIFIC RAILROAD COMPANY

vs.

MARTIN V. SIDES et al.

Now on this day this cause coming regularly on to be heard, the plaintiff appearing by its attorney, C. C. Dorsey, Esq., and the defendants appearing by their attorney, Thos. H. Hardcastle, Esq., a jury being by both parties expressly waived, this cause is now tried to the Court.

The defendant Martin V. Sides, by his attorney, filed his election to stand on his answer, and said election is in words and figures as follows, to-wit:

THE STATE OF COLORADO,
County of Arapahoe, ss:

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff,

vs.

MARTIN V. SIDES et al., Defendants.

Election.

Comes now the defendant, Martin V. Sides, by his counsel, and elects to stand by his answer heretofore filed in the above entitled cause.

(Signed) THOS. H. HARDCASTLE,
Attorney for Martin V. Sides.

In the District Court.

UNION PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
MARTIN V. SIDES and WALTER W. SCHERRER, Defendants.

Stipulation.

It is hereby stipulated, by and between the parties hereto by their respective attorneys, and as a part of the plaintiff's evidence upon the trial of this cause, that the defendant Martin V. Sides did at the time of the commencement of this action, ever since has and now does detain from the plaintiff the possession of the premises described in the complaint, except that part of the same lying within a distance of one hundred (100) feet from the center line of
25 the main track of plaintiff, as to which portion of said premises if included within the enclosure of the defendant Sides, it is agreed that the same is so included through inadvertence and mistake upon the part of defendant Sides, and not pursuant to any claim of right, title or interest therein, maintained by said defendant, as appears from the disclaimer contained in his answer herein.

And it is further stipulated and agreed, that prior to the commencement of this action the plaintiff demanded of the defendant Sides possession of said premises.

(Signed) DORSEY & HODGES.
Attorneys for Plaintiff.

(Signed) THOS. H. HARDCASTLE.
Attorneys for Defendants.

(Endorsed:) No. 199. In the District Court, County of Arapahoe. Union Pacific Railroad Company, Plaintiff, vs. Martin V. Sides and Walter W. Scherrer, Defendants. Stipulation. Filed in the District Court of Arapahoe County, Colorado, March 26th, 1909. Wm. H. Shea, Clerk. Dorsey & Hodges, Attorneys for plaintiff.

Mr. Hardcastle moved the Court for judgment as of non-suit, which motion was overruled.

Mr. Hardcastle on behalf of defendants moved the Court for judgment in favor of the defendants, which motion was overruled.

The Court having heard the evidence and listened to the arguments of counsel, and being fully advised in the premises, doth find the issues herein joined in favor of the plaintiff, and the findings and judgment of the Court are prepared in writing and signed by the Judge.

26 It is ordered by the Court that the findings and judgment be entered in the Judgment Book of this Court, which said findings and judgment is in words and figures as follows, to-wit:

STATE OF COLORADO,
County of Arapahoe ss:

In the District Court.

UNION PACIFIC RAILROAD COMPANY, a Corporation, Plaintiff,
vs.
MARTIN V. SIDES and WALTER W. SCHERRER, Defendants.

Findings and Judgment.

Now on this 26th day of March, A. D. 1909, the same being one of the regular juridical days of the March, 1909, term of said court, this cause coming on regularly for trial upon the merits, the plaintiff appearing by C. C. Dorsey, its attorney, and the defendants appearing by Thomas H. Hardcastle, their attorney, a jury having been expressly waived by both parties; and it appearing to the Court that the defendant Walter W. Scherrer has heretofore filed an answer herein, disclaiming any right, title, interest or claim in or to the lands and premises described in the complaint, or any part thereof; and it further appearing that the defendant Martin V. Sides has elected to stand upon the second and third defense and counterclaim set up in his answer herein (to which demurrers have heretofore been sustained), and the Court having heard the evidence and the admissions of counsel as to the facts involved herein, and listened to the arguments of counsel, and being now fully advised in the premises, doth find the issues herein joined in favor of the plaintiff and against the said defendants, except as to the claim for damages made by the plaintiff against said defendants, concerning

27 which no evidence has been offered, and doth further find:

(1) That the plaintiff was, at the time of the commencement of this action, ever since has been, and now is the owner in fee and entitled to the possession of each and every part of that certain tract of land described in the complaint herein, and situate, lying and being in the County of Arapahoe, State of Colorado, which tract is a part of the East one-half (E. ½) of the Southeast quarter (S. E. ¼) of section eight (8), Township four (4) South, Range sixty-one West, and is more particularly described as follows, to-wit:

Beginning at a point on the east boundary line of Section eight (8), Township four (4) South, Range sixty-one (61) West, which is ninety (90) feet distant southwesterly from and at right angles to the center line of the main track of Union Pacific Railroad Company, the plaintiff herein; thence northwesterly along a line ninety (90) feet from and parallel with the center line of said main track, a distance of one hundred and fifty (150) feet to a point; thence southwesterly and at right angles to the center line of said main track, a distance of sixty (60) feet to a point; thence southeasterly along a line one hundred and fifty (150) feet from and parallel with the center line of said main track, a distance of one hundred sixty-two and one-half (162½) feet, more or less, to the east boundary line of said section; thence north along said east boundary line of said section, to the place of beginning.

(2) That the defendant Martin V. Sides did not, at the time of the commencement of this action have, never since has had, and has not now, any right, title or interest whatsoever in or to said premises, or any part thereof, or in or to the possession of the same, or any part thereof.

(3) That the defendant Walter W. Scherrer did not, at the time of the commencement of this action have, never since has had, and has not now, any right, title, interest or claim whatsoever in or to said premises, or any part thereof, or the possession of the same, or any part thereof; nor was he at any of said times in possession of any part of the same, as appears by his answer and disclaimer filed herein, and therefore no relief is adjudged as against said defendant.

28 Wherefore, it is ordered and adjudged that the plaintiff do have and recover from the defendant Martin V. Sides all of the premises hereinabove and in the complaint herein described, and the possession of the same, and each and every part thereof, and that the said defendant Martin V. Sides be and hereby is ousted from possession of the above described property, and each and every part thereof, and that the plaintiff have a special execution against the said defendant Martin V. Sides in the nature of a writ of possession, directing the sheriff to put the plaintiff into immediate and complete possession of the above described property, and each and every part thereof, and that the plaintiff do have and recover against the said defendant Martin V. Sides its costs and charges by it in this behalf expended, to be taxed; that judgment be entered for the same and that plaintiff have execution therefor.

Done in open Court this 26th day of March, A. D. 1909.

By the Court:

(Signed) CHARLES McCALL, *Judge*.

Now comes counsel and moves the court to grant an appeal to the Supreme Court of the State of Colorado, which is granted upon condition that the defendants file their bond on appeal in the sum of Seven Hundred Fifty Dollars ($750.00) within thirty days from this day, and they are allowed ninety days to prepare and tender their bill of exceptions by them reserved in this behalf, which bill of

exceptions, when signed by the Judge of this Court, shall be filed as of this day, and become a part of the record of this action.

And afterwards, and on, to-wit, the 21st day of April, A. D. 1909, came said defendant Martin V. Sides, and filed herein his ap-
29 peal bond. And said appeal bond is in words and figures as follows, to-wit:

Know all men by these presents, That we, Martin V. Sides, as principal, and The Empire State Surety Company, as surety, a corporation of the State of New York, doing business under the laws of the State of Colorado, are held and firmly bound unto Union Pacific Railroad Company, its successors and assigns in the penal sum of Seven Hundred and Fifty ($750.00) Dollars, lawful money of the United States, to be paid to the above named obligee, its successors or assigns, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, this 21st day of April, in the year of our Lord one thousand nine hundred and nine.

Whereas, the said Union Pacific Railroad Company did, on the 26th day of March, A. D. 1909, at a term of the District Court then being holden within and for the County of Arapahoe, and State of Colorado, obtain judgment against the above bounden Martin V. Sides for certain land in Arapahoe County, Colorado, described as follows, to-wit:

Beginning on the east boundary line of section eight (8) Township four (4) South, Range Sixty-one West, ninety feet distant southwestwardly from and at right angles to the center line of the main tract of said Union Pacific R. R. Co. thence northwestwardly along a line ninety feet from and parallel with the center line of said main track one hundred and fifty feet, thence southwesterly and at right angles to said center line sixty feet; thence southeasterly parallel to said center line one hundred and sixty-two and one-half feet more or less to the east boundary line of said section; thence along said east boundary line to the place of beginning; and for the costs of said suit; from which judgment said Sides has prayed for, obtained and taken an appeal to the Supreme Court of said State.

Now the condition of the above obligation is such, That if the said Martin V. Sides shall duly prosecute the said appeal and shall
30 pay and satisfy the judgment, costs, interest and damages, in case the judgment shall be affirmed by the Supreme Court, whether judgment shall be given by the Supreme Court or by the said District Court, then this obligation to be null and void, otherwise to remain in full force and virtue.

(Signed) M. V. SIDES. [SEAL.]
[CORPORATE SEAL.] THE EMPIRE STATE SURETY COMPANY. [SEAL.]
(Signed) By JOHN R. GEMMILL, [SEAL.]
Its Attorney-in-Fact.

(Endorsed:) No. 199. District Court of Arapahoe County. Union Pacific Railroad Company, Pl'ff, vs. Martin V. Sides and

Walter W. Scherrer. Appeal Bond. District Court. Filed Apr. 21, 1909. Arapahoe County, Colo. (Signed) Wm. H. Shea, Clerk. Approved this 21st day of April, A. D. 1909, by Wm. H. Shea, Clerk.

STATE OF COLORADO,
County of Arapahoe, ss:

I, Wm. H. Shea, Clerk of the District Court of Arapahoe County, State aforesaid, do hereby certify the above and foregoing to be a true, complete, and perfect transcript and copy of all the proceedings had and entered of record in a certain cause in said Court lately depending wherein Union Pacific Railroad Company was plaintiff and Martin V. Sides and Walter W. Scherrer were defendants, as the same now remains on file and of record in this office.

Witness my hand and seal of said Court, at the Court House in Littleton County and State aforesaid, this 23rd day of July, A. D. 1909.

[SEAL.] WM. H. SHEA, *Clerk.*

Filed in Supreme Court, Sep. 14, 1909. James R. Killian, Clerk.

31 STATE OF COLORADO,
County of Arapahoe, ss:

In the District Court.

No. 1991.

THE UNION PACIFIC RAILROAD COMPANY, Plaintiff,
vs.
MARTIN V. SIDES and WALTER W. SCHERRER, Defendants.

Bill of Exceptions.

Be it remembered, that on this 25th day of March, A. D. 1909, the same being one of the regular juridical days of the March A. D. 1909 term of said Court, this cause coming on for trial to the court before the Hon. Charles McCall, Judge of said court, a jury trial being expressly waived by all the parties to said cause.

The plaintiff appeared by Clayton C. Dorsey, Esq., its attorney, and the defendants appeared by Thomas H. Hardcastle, Esq., their attorney;

Whereupon the following proceedings were had:

Mr. HARDCASTLE: On behalf of the defendants I desire to object to the introduction of any testimony, and move to dismiss the complaint herein upon the ground that said complaint states no cause of action against the defendants or either of them, and because it appears that there never has been any congressional grant of any right of way to the plaintiff at the place mentioned in the complaint, or in any event no grant of any right of way in excess of 100 feet on either side of the center line of the plaintiff's track.

The said objection and motion were thereupon duly argued by counsel and both the objection to the introduction of testimony and also the motion to dismiss, were overruled.

To which action of the court in each and both of said respects the defendants and each of them, by their counsel then and there duly excepted.

Without waiving any objection or exception hitherto made
32 herein and saving and reserving all objections and exceptions on the ground of materiality or relevancy it was stipulated in open court that witnesses for the plaintiff, if present, would testify as follows and plaintiff's evidence purports to show:

That plaintiff is the successor in title to the Kansas Pacific Railway Company, formerly known as the Union Pacific Railroad, Eastern Division, and before that known as the Leavenworth, Pawnee and Western Railway Company of Kansas; and that said companies last named are the same companies mentioned in the several acts of Congress in the complaint referred to.

That said Kansas Pacific Railway Company did in the year 1870 construct its railroad from Kansas City to Denver through, over, and across the property described in the complaint, and that said railroad and the main track thereof is now in the same location in which it was at the time of the original construction, and ever since has been.

That the predecessors in title of the plaintiff complied in all particulars with the requirements of the said various acts of Congress in said complaint mentioned.

That the plaintiff company is now the owner of the lands, if any, conveyed to said predecessor companies under and by virtue of said acts of congress for a right of way.

That the parcel of land described in the complaint lies within a distance of 200 feet from the center line of the main track of said railroad, but the land in dispute lies outside of a line 100 feet from the center line of said main track.

That said railroad is a part of the railroad constructed from Mis-
souri River at the mouth of the Kansas River, westward to a
33 connection with the main line of the Union Pacific as authorized by said Acts of Congress.

That the same has been ever since its construction, and is now continuously operated as a railroad, and its connection with the main line of the Union Pacific is at Cheyenne, Wyoming.

The following stipulation signed by the attorneys for the plaintiff and by the attorneys for the defendants, was offered in evidence:

"It is hereby stipulated, By and between the parties hereto, by their respective attorneys, and as a part of the plaintiff's evidence upon the trial of this cause, that the defendant Martin V. Sides did at the time of the commencement of this action, ever since has and now does detain from the plaintiff the possession of the premises described in the complaint, except that part of the same lying within a distance of one hundred (100) feet from the center line of the main track of plaintiff, as to which portion of said premises, if included within the enclosures of the defendant Sides, it is agreed that the

ame is so included through inadvertence and mistake upon the part of the defendant Sides, and not pursuant to any claim of right, title or interest therein, maintaineed by said defendant, as appears from the disclaimer contained in his answer herein.

And it is further stipulated and agreed, That prior to the commencement of this action the plaintiff demanded of the defendant Sides possession of said premises."

This was all the testimony offered.

Mr. HARDCASTLE: On behalf of the defendant Sides and Scherrer I now move for a judgment of non suit upon the ground that no right or cause of action is shown either by the complaint or the evidence offered as to any portion of the land in dispute.

The COURT: The motion is denied

To which ruling of the Court the defendants, by their counsel then and there duly excepted.

Mr. HARDCASTLE: The defendants rest without the introduction of any evidence or testimony, and I now move for a judgment in favor of the defendants upon the grounds stated in my motion to dismiss and in the motion for judgment of non suit.

34 The COURT: The motion is denied.

To which ruling of the Court the defendants, by their counsel then and there duly excepted.

Mr. DORSEY: I move for judgment in favor of the plaintiff.

The COURT: The judgment will be entered.

Mr. HARDCASTLE: To the judgment and to the entry thereof, the defendants except. We now move the Court to grant an appeal to the Supreme Court of the State of Colorado, and ask the Court to fix the amount of the appeal bond and the time for its filing and approval, and also time for a bill of exceptions.

The COURT: The defendants are allowed thirty days from this date in which to file an appeal bond in the penal sum of Seven Hundred, Fifty ($750.00) Dollars, the bond to be approved by the Clerk of this Court. The defendants are also allowed ninety days in which to prepare and tender a bill of exceptions.

The above and foregoing was all the evidence given, offered, or received in the above entitled cause, and inasmuch as the above and foregoing matters and things do not fully appear of record in this cause the defendants hereby present this their bill of exceptions and pray that the same may be signed, sealed and made a part of the record of this cause, which is accordingly done this 28th day of April A. D. 1909.

CHARLES McCALL, *Judge*. [SEAL.]

Tendered this 28th day of April A. D. 1909.

CHARLES McCALL, *Judge*.

O. K. 24th day of April, 1909.

CLAYTON C. DORSEY,

Attorney for Plaintiff.

35 Filed in the District Court in and for Arapahoe County, Colorado, this 30th day of April, 1909, as of the 26th day of March, 1909.

WM. H. SHEA,
Clerk of the District Court.

Filed in Supreme Court Sep. 14, 1909. James R. Killian, Clerk.

In the Supreme Court of the State of Colorado.

6952.

MARTIN V. SIDES and WALTER W. SCHERRER, Appellants,
v.
UNION PACIFIC RAILROAD COMPANY, a Corporation, Appellee.

Assignment of Errors.

Come now the above named appellants, by Milton Smith and Charles R. Brock, their attorneys, and make the following assignment of errors, to wit:

(1) The court erred in overruling the demurrer of the appellant Martin V. Sides to the complaint.

(2) The court erred in sustaining the demurrer of the appellee as to the answer of the appellant Martin V. Sides.

(3) The court erred in denying appellants' motion for a non-suit.

(4) The court erred in holding that the appellee was entitled under the Congressional grant to any right of way in excess of one hundred (100) feet on either side of the center line of its track.

(5) The court erred in rendering judgment for appellee.

MILTON SMITH,
CHAS. R. BROCK,
Attorneys for Appellants.

Filed in Supreme Court Sep. 14, 1909. James R. Killian, Clerk.

36 Be it remembered that on the 15th day of January, A. D. 1910, the same being one of the Juridical days of the regular January A. D. 1910 term of said court, the following among other proceedings, were had and entered of record, to-wit:

No. 6951.

GEORGE A. SNOW et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Appeal from the District Court of Arapahoe County.

and

No. 6952.

MARTIN V. SIDES et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Appeal from the District Court of Arapahoe County.

At this day, agreeable to the terms of a stipulation filed in the above entitled causes, it is considered and ordered by the Court that said cases be consolidated for review in this Court, and that appellants be, and they are hereby, allowed until February 1st, next, within which to file their brief and argument; that appellee be, and it is hereby, allowed ninety days thereafter in which to file its brief and argument; that appellants be, and they are hereby, allowed thirty days after receipt of appellee's brief in which to reply thereto.

And afterwards and on the 14th day of May, A. D. 1910, the same being one of the juridical days of the April A. D. 1910 term of said Court, the following among other proceedings, were had and entered of record, to-wit:

No. 6952.

MARTIN V. SIDES et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Appeal from the District Court of Arapahoe County.

At this day, agreeable to the terms of a stipulation filed in
37 this cause, it is considered and ordered that appellee be, and it is hereby, allowed until September 1st, next, in which to file its brief and argument herein.

And afterwards and on the 30th day of September, A. D. 1910, the same being one of the juridical days of the regular September A. D. 1910 term of said Court, the following, among other proceedings were had and entered of record, towit:

No. 6951.

GEORGE A. SNOW et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Consolidated with

No. 6952.

MARTIN V. SIDES et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Appeal from the District Court of Arapahoe County.

At this day, in accordance with the terms of a stipulation filed in the above entitled causes, it is considered and ordered that said appellee be, and it is hereby, allowed until November 1st, next, in which to file its brief and argument herein.

And afterwards and on the 2nd day of October, A. D. 1911, the same being one of the juridical days of the regular September, A. D. 1911 term of said court, the following, among other proceedings were had and entered of record, to-wit:

In the Matter of Transferring Cases to the Court of Appeals.

At this day, by virtue of an Act of the Eighteenth General Assembly of the State of Colorado, entitled "An Act in Relation to Courts of Review," it is considered and ordered that the following cases now pending in this court on appeal be forthwith transferred to the Court of Appeals created by said Act, to-wit:

38

No. 6952.

MARTIN V. SIDES et al.
v.
UNION PACIFIC RAILROAD COMPANY.

Appeal from the District Court of Arapahoe County.

And afterwards and on the 14th day of November, A. D. 1911, said cause, with all the pleadings in connection therewith, was re-filed in the Supreme Court.

And afterwards and on the 11th day of March, A. D. 1912, the same being one of the juridical days of the regular January, A. D. 1912, term of said court, the following, among other proceedings, were had and entered of record, to-wit:

No. 6951.

GEORGE A. SNOW et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Appeal from the District Court of Arapahoe County.

and

No. 6952.

MARTIN V. SIDES et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Appeal from the District Court of Arapahoe County.

At this day, in accordance with the terms of a stipulation filed in this cause, it is ordered that appellee be allowed until May 1st, next, in which to file its brief and argument herein.

And afterwards, and on the 4th day of June, A. D. 1912, the same being one of the juridical days of the regular April, A. D. 1912, term of said Court, the following among other proceedings, were had and entered of record in said Court, to-wit:

No. 6951.

GEORGE A. SNOW et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Appeal from the District Court of Arapahoe County.

39 and

No. 6952.

MARTIN V. SIDES et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Appeal from the District Court of Arapahoe County.

At this day, in accordance with the terms of a stipulation filed herein, it is ordered that appellee be allowed until July 1st, next, in which to file its brief in the above entitled cause.

And afterwards and on the 2nd day of November, A. D. 1912, the same being one of the juridical days of the regular September,

A. D. 1912, term of said Court, the following, among other proceedings, were had and entered of record in said Court, to-wit:

No. 6951.

GEORGE A. SNOW et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Appeal from the District Court of Arapahoe County.

and

No. 6952.

MARTIN V. SIDES et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Appeal from the District Court of Arapahoe County.

At this day, in accordance with the terms of a stipulation filed in the above entitled causes, it is ordered that said appellee be allowed to file its brief and argument herein at this time, which is accordingly done.

And afterwards and on November 27th, A. D. 1912, a certain stipulation was filed in this cause, of which the following is a true copy, to-wit:

40 In the Supreme Court of the State of Colorado.

No. 6952.

MARTIN V. SIDES and WALTER W. SCHERRER, Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, a Corporation, Appellee.

Stipulation.

It is hereby stipulated by and between the parties hereto, by their respective attorneys:

1. That the appellants shall, and hereby do, expressly waive any and all errors or assignments of error based upon, arising from or relating to the third defense contained in their answer herein, or the ruling upon the demurrer to said third defense, and said third defense is hereby expressly withdrawn.

2. That the appellants shall, and hereby do, expressly waive any and all errors or assignments of error based upon, arising from or relating to the counter-claim contained in the answer herein, or the ruling upon the demurrer to said counter-claim, and said counter-claim is hereby expressly withdrawn.

3. That in case this court shall reverse the action of the court below in respect to the order heretofore made overruling appellants' demurrer to the complaint herein, the said appellee shall, and hereby does, elect to stand upon and abide by said complaint as now drafted.

4. That in case this court shall reverse the ruling of the court below in sustaining appellee's demurrer to the second defense contained in the answer herein, and shall determine that said demurrer should have been overruled, the said appellee shall, and hereby does, elect to stand upon said demurrer, and decline to reply
41 or otherwise plead further to said second defense.

5. That this stipulation is made for the purpose of expediting the final determination of this controversy and saving unnecessary costs to the litigants, but is without prejudice to the right of either party to secure a review of the final judgment of this court, or of the District Court, by appropriate proceedings in any court of competent jurisdiction.

MILTON SMITH,
CHAS. R. BROCK,
W. H. FERGUSON,
Attorneys for Appellants.
C. C. DORSEY,
E. I. THAYER,
Attorneys for Appellee.

Filed in Supreme Court Nov. 27, 1912. James R. Killian, Clerk.

And afterwards and on the 27th day of November, A. D. 1912, the same being one of the juridical days of the regular September A. D. 1912 term of said court, the following, among other proceedings, were had and entered of record in said Court, to-wit:

No. 6952.

MARTIN V. SIDES et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Appeal from the District Court of Arapahoe County.

At this day come appellants, by Charles R. Brock, Esquire, their attorney, also comes said appellee, by Clayton C. Dorsey, Esquire, its attorney, and this cause is argued orally by counsel and submitted to the consideration and judgment of the Court.

And afterwards, and on the 7th day of July, A. D. 1913, the formal opinion of the court in this matter was filed in the office
42 of the Clerk of this Court of which the following is a true copy:

Filed in Supreme Court Jul- 7, 1913. James R. Killian, Clerk.

No. 6952.

MARTIN V. SIGES and WALTER W. SCHERRER, Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, a Corporation, Appellee.

Appeal from the District Court of Arapahoe County.

Hon. Charles McCall, Judge.

Judgment Reversed.

Mr. Milton Smith, Mr. Charles B. Brock, Mr. W. H. Ferguson, for Appellants. Mr. W. W. Platt, of Counsel.

Mr. Clayton C. Dorsey, Mr. E. I. Thayer, Mr. N. H. Loomis, for Appellee. Mr. Gerald Hughes, of Counsel.

Mr. Justice GARRIGUES delivered the opinion of the Court.

13 This case presents the identical question decided in No. 6951, entitled Sires, et. al. v. Union Pacific Railroad Company. For the reasons stated in that opinion, the judgment of the lower court is reversed, and judgment will be entered here in favor of appellants.

Reversed. Decision en banc.

14 And afterwards and on the 7th day of July, A. D. 1913, the same being one of the juridical days of the regular April, A. D. 1913 term of said Court, judgment was entered in harmony with the opinion announced, of which judgment the following is a true copy, to-wit:

No. 6952.

MARTIN V. SIGES and WALTER W. SCHERRER, Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

Appeal from the District Court of Arapahoe County.

This cause having been brought to this Court by appeal to review the judgment of the District Court of Arapahoe County, and having been heretofore argued by counsel and submitted to the consideration and judgment of the Court upon the matters assigned as constituting error in the proceedings and judgment of said District Court, and it now appearing to the Court that there is manifest error in the proceedings and judgment of said District Court,

It is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby, reversed, annulled, and altogether held for naught.

It is further ordered and adjudged by the Court that said appellee, being the plaintiff, take nothing by its said suit and that this action

be, and the same is hereby, dismissed out of court, and that said appellants, being the defendants, do have and recover of and from said appellee their costs of suit in said District Court, as well as in this Court, expended, and that execution issue therefor.

And let the opinion of the Court filed herein be published.

15 And afterwards, and on the 18th day of July, A. D. 1913, appellee filed in the office of the Clerk of this Court, its petition for a writ of error from the United States Supreme Court to this Court, which petition is hereto attached.

16 In the Supreme Court of the State of Colorado.

No. 6952.

MARTIN V. SIDES and WALTER W. SCHERRER, Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, a Corporation, Appellee.

Petition for Writ of Error.

Union Pacific Railroad Company, Appellee in the above entitled cause, considering itself aggrieved by the final decision of the Supreme Court of Colorado in rendering judgment against it in said cause, and considering that manifold errors appear in the judgment and decision of said Supreme Court of Colorado, hereby respectfully prays a writ of error from the said decision and judgment to the Supreme Court of the United States, and hereby requests an order fixing the amount of its bond, the same to operate as a supersedeas. Assignment of errors is filed herewith.

N. H. LOOMIS,
CLAYTON C. DORSEY,
Attorneys for Union Pacific Railroad Company.

GERALD HUGHES,
Of Counsel.

17 STATE OF COLORADO,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by Union Pacific Railroad Company to said Martin V. Sides and Walter W. Scherrer, in the sum of One thousand Dollars ($1000.00), said bond to operate as a supersedeas.

Dated at Denver, Colorado, July 18th, 1913.

GEORGE W. MUSSER,
Chief Justice of the Supreme Court of Colorado.

[Endorsed:] Court No. 6952. Div. —. In the Supreme Court of the State of Colorado. Martin V. Sides and Walter W. Scherrer, Plaintiffs in Error, vs. Union Pacific Railroad Company, Defendant in Error. Petition for writ of error. Hughes & Dorsey, Attorneys for Defendant in Error. No. —.

48 And on the said 18th day of July, A. D. 1913, appellee also filed in the office of the Clerk of this court, its assignments of error, which assignments of error are hereto attached.

49 Filed in Supreme Court Jul- 18, 1913. James R. Killian, Clerk.

In the Supreme Court of the State of Colorado.

No. 6952.

UNION PACIFIC RAILROAD COMPANY, a Corporation, Appellee Here and Plaintiff in Error in the Supreme Court of the United States,

vs.

MARTIN V. STOKS and WALTER W. SCHERRER, Appellants Here and Defendants in Error in the Supreme Court of the United States.

Assignment of Errors on Writ of Error from the Supreme Court of the United States.

Union Pacific Railroad Company, Appellee in the Supreme Court of the State of Colorado, and Plaintiff in Error in the Supreme Court of the United States, files herewith its Petition for Writ of Error and says that there are errors in the record, proceedings and decision of the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States upon said Writ of Error said Union Pacific Railroad Company makes the following Assignment of Errors:

First. The Supreme Court of Colorado erred in deciding against and denying the title, right, privilege or immunity specially
50 set up and claimed by Union Pacific Railroad Company under the Statutes of the United States, to-wit, the claim of said Union Pacific Railroad Company to a strip of land for right of way through the premises in controversy 400 feet in width, granted by the Pacific Railroad Acts of the United States as and for a right of way, to-wit, by the Act of July 1, 1862 (12 Stat. 489), entitled "An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to Secure to the Government the Use of the Same for Postal, Military and other purposes;" the Act of July 2, 1864, amendatory thereof (13 Stat. 356); the further amendatory act of July 3, 1866 (14 Stat. 79), and other acts of Congress amendatory thereof and supplemental thereto.

Second. The Supreme Court of Colorado erred in holding and deciding that under said acts of Congress Union Pacific Railroad Company was not the present owner of said strip of land 400 feet in width so granted as and for a right of way, thereby denying and deciding against the right and title of said Union Pacific Railroad Company thereunder, which had been and was specially set up and claimed.

Third. The Supreme Court of Colorado erred in holding and de-

ling that the Statutes of the State of Colorado relative to adverse ssession were applicable to or effective against the right and title anted by said acts of Congress hereinabove mentioned.

Fourth. The Supreme Court of Colorado erred in holding and eiding that by reason of adverse possession, or by compliance with any statutes of Colorado relative thereto, the right and title conferred by said acts of Congress had been or could be lost, diminished or in any manner affected or impaired.

Fifth. The Supreme Court of Colorado erred in holding and deling that by virtue of the statutes of the State of Colorado relating adverse possession, the Appellants in the Supreme Court of Colodo, Defendants in Error in the Supreme Court of the United ates, or either thereof, became or were or are entitled to any ortion whatsoever of said strip of land 400 feet in width, title and ght to which was granted and conferred by said acts of Congress reinabove mentioned.

Sixth. The Supreme Court of Colorado erred in holding and deding that the Act of Congress, approved June 24, 1912, entitled An Act Legalizing certain Conveyances heretofore made by the nion Pacific Railroad Company," had any application whatsoer to the instant case, upon the facts and circumstances admitted conclusively shown by this record; and further erred in holding at by virtue of said Act of June 24, 1912, the title, right and rivilege claimed by Union Pacific Railroad Company under said acific Railroad Acts, hereinabove mentioned, should be and was enied and decided against.

Seventh. The Supreme Court of Colorado erred in holding and eciding that said Act of Congress approved June 24, 1912, was or as intended to be retrospective in its operation or retroactive in ffect, and so applicable to the instant case.

Eighth. The Supreme Court of Colorado erred, in holding and deciding that said Act of Congress approved June 24, 1912, was intended to give or did give the acts, transactions, omissions, conditions and circumstances occurring or existing rior to its passage a legal effect different from that which attached them at the time they occurred, and so potent as to operate imediately and conclusively forthwith upon the passage and approval f said act of Congress, to deprive Union Pacific Railroad Company f the title theretofore vested in it under said Pacific Railroad acts ereinabove mentioned, and to transfer said title to and confer the ame upon said Apellants in the Supreme Court of Colorado, Defendants in Error in the Supreme Court of the United States, thus uthorizing and requiring the Supreme Court of Colorado, as it eld and decided, to deny and decide against the right, title and rivilege specially set up and claimed by Union Pacific Railroad ompany under said Pacific Railroad Acts.

Ninth. The Supreme Court of Colorado erred in holding and deciding that said Act of Congress approved June 24, 1912, and entitled "An Act Legalizing certain Conveyances heretofore made by he Union Pacific Railroad Company," if retrospective in its operaion or retroactive in effect, upon the facts, circumstances and onditions disclosed by this record (as said court held it was), was

not in conflict with the Constitution of the United States, and particularly with those provisions thereof, specially set up by said Union Pacific Railroad Company, providing that "No person shall * * * be deprived of life, liberty or property without due process of law."

Tenth. The Supreme Court of Colorado erred in holding and deciding that said Act of Congress approved June 24, 1912, if given said retrospective and retroactive construction attributed to it by said court, was not in conflict with the provisions of the Constitution of the United States hereinabove mentioned, and in thus denying to Union Pacific Railroad Company and deciding against the right, privilege and immunity specially set up and claimed by said Union Pacific Railroad Company under the Constitution of the United States.

Eleventh. The Supreme Court of Colorado erred in holding and deciding that the Appellants in said court, Defendants in Error in the Supreme Court of the United States, were, and said Union Pacific Railroad Company, Appellee in said Court, and Plaintiff in Error in the Supreme Court of the United States, was not, the owners of the land in controversy.

Twelfth. The Supreme Court of Colorado erred in ordering, directing and entering judgment in favor of said Appellants, Defendants in Error in the Supreme Court of the United States, and against said Union Pacific Railroad Company, Appellee in that Court, and Plaintiff in Error in the Supreme Court of the United States.

Wherefore, Union Pacific Railroad Company, Plaintiff in Error in the Supreme Court of the United States prays that the judgment and decision of the Supreme Court of Colorado in the above entitled cause be reversed, and that a judgment be rendered in favor of said Union Pacific Railroad Company.

N. H. LOOMIS,
CLAYTON C. DORSEY,
Attorneys for Union Pacific Railroad Company.

GERALD HUGHES,
Of Counsel.

[Endorsed:] Court No. 6952, Div. —. In the Supreme Court of the State of Colorado. Union Pacific Railroad Company, Appellee, Plaintiff in Error, vs. Martin V. Sides et al., Appellants, Defendant in Error. Assignment of Errors. Hughes & Dorsey, Attorneys for Plaintiff in Error. No. —.

And afterwards and on the said 18th day of July, A. D.

In the Supreme Court of the State of Colorado.

No. 6952.

ARTIN V. SIDES and WALTER W. SCHERRER, Appellants in the Supreme Court of Colorado, Defendants in Error in the Supreme Court of the United States,

vs.

NION PACIFIC RAILROAD COMPANY, a Corporation, Appellee in the Supreme Court of Colorado, Plaintiff in Error in the Supreme Court of the United States.

Order Allowing Writ of Error.

The writ of error from the Supreme Court of the United States the Supreme Court of the State of Colorado, this day applied for Union Pacific Railroad Company, Appellee in this court and aintiff in Error in the Supreme Court of the United States, is ereby allowed.

Dated this 18th day of July, A. D. 1913.

GEORGE W. MUSSER,
Chief Justice of the Supreme Court of Colorado.

Filed in Supreme Court. Jul- 18, 1913. James R. Killian, Clerk.

$6\frac{1}{2}$ [Endorsed.] Court No. 6952. Div. —. In the Supreme Court of the State of Colorado. Martin V. Sides et al., Appellants, Defendants in Error, vs. Union Pacific Railroad Company, Appellee, Plaintiff in Error. Order Allowing Writ of Error. Hughes & Dorsey, Attorneys for Plaintiff in Error. No. —.

7 And in accordance with the terms of the foregoing order allowing a writ of error, the appellee filed in this office its ond duly approved by the Chief Justice of this Court, of which ond, the following is a true copy:

In the Supreme Court of the State of Colorado.

No. 6952.

NION PACIFIC RAILROAD COMPANY, a Corporation, Appellee in the Supreme Court of Colorado, Plaintiff in Error in the Supreme Court of the United States,

vs.

MARTIN V. SIDES and WALTER W. SCHERRER, Appellants in the Supreme Court of Colorado, Defendants in Error in the Su-

pany and —— ——, as sureties, are held and firmly bound unto Martin V. Sides and Walter W. Scherrer, and their respective heirs, personal representatives and assigns, in the sum of one thousand dollars ($1,000), to be paid to said Martin V. Sides and said Walter W. Scherrer, for which payment well and truly to be made, we bind ourselves, our heirs, personal representatives and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18th day of July, A. D. 1913.

58 Whereas, the above bounden Union Pacific Railroad Company, a corporation, as Plaintiff in Error, seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment and decision rendered in the above entitled action by the Supreme Court of the State of Colorado;

Now, therefore, the condition of this obligation is such, That, if the above named Union Pacific Railroad Company, Plaintiff in Error in the Supreme Court of the United States, shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged and awarded if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

UNION PACIFIC RAILROAD COMPANY,

[SEAL.] By CLAYTON C. DORSEY,
Its Agent and General Attorney.

NATIONAL SURETY COMPANY,
By C. H. TANCRAY, *Attorney in Fact.*

This bond approved this 18th day of July, A. D. 1913.

GEORGE W. MUSSER,
Chief Justice of the Supreme Court of Colorado.

Filed in Supreme Court, Jul- 18, 1913. James R. Killian, Clerk.

59 And on said 18th day of July, A. D. 1913, there was filed in the office of the Clerk of this Court a writ of error issued in this matter, which writ of error is hereto attached.

60 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said the Supreme Court of the State of Colorado before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Martin V. Sides and Walter W. Scherrer, Appellants in said Supreme Court of Colorado, and defendants in the District Court of Arapahoe County, Colorado, and Union Pacific Railroad Company, Appellee in said Supreme Court of Colorado, and plaintiff in said District Court of Arapahoe County,

Colorado, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Union Pacific Railroad Company, a corporation, as
61 by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglas White, Chief Justice of the United States, the 18th day of July, in the year of our Lord one thousand nine hundred and thirteen.

[Seal United States District Court, District of Colorado.]

CHARLES W. BISHOP,
Clerk of the District Court of the United States for the District of Colorado.

Allowed, this 18th day of July, A. D. 1913.

GEORGE W. MUSSER,
Chief Justice of the Supreme Court of Colorado.

Filed in Supreme Court Jul- 18, 1913. James R. Killian, Clerk.

61½ [Endorsed:] Court No. —, Div. —. In the — Court —. Union Pacific Railroad Company, Plaintiff in Error, vs. Martin V. Sides et al., Defendants in Error. Writ of Error. Hughes & Dorsey, Attorneys for Plaintiff in Error. No. —.

62 And on said 18th day of July, A. D. 1913, a citation was issued out of this court to the above named appellants, which citation was later returned and filed with an acknowledgment of service thereon, and which is hereto attached.

63 UNITED STATES OF AMERICA.
State and District of Colorado, ss:

The President of the United States of America to Martin V. Sides and Walter W. Scherrer, Greeting:

You and each of you are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of Colorado, wherein Union Pacific Railroad Company is Plaintiff in Error and you are Defendants in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Chief Justice of the Supreme Court of the State of Colorado, this 18th day of July, A. D. 1913.

GEORGE W. MUSSER.
Chief Justice of the Supreme Court of Colorado.

Attest:

[Seal Supreme Court, State of Colorado.]

JAMES R. KILLIAN,
Clerk of the Supreme Court of Colorado.

The undersigned, attorneys of record for the defendants in error in the above entitled cause, who were appellants before the Supreme Court of Colorado, hereby acknowledge due service of the above citation, and respectively enter appearance in the Supreme Court of the United States.

Dated July 18, 1913.

MILTON SMITH,
CHARLES R. BROCK,
W. H. FERGUSON,
Attorneys for Defendants in Error.

Filed in Supreme Court Jul- 18, 1913. James R. Killian, Clerk.

63½ [Endorsed:] Court No. —. Div. —. In the — Court —. Union Pacific Railroad Company, Plaintiff in Error, vs. Martin V. Sides et al., Defendant in Error. Citation. Hughes & Dorsey, Attorneys for Plaintiff in Error. No. —.

64 And afterwards, and on the 18th day of July A. D. 1913, appellee filed in the office of the Clerk of this Court, its praecipe for a transcript of the record herein, of which praecipe the following is a true copy:

In the Supreme Court of the State of Colorado.

No. 6952.

NION PACIFIC RAILROAD COMPANY, a Corporation, Appellee in the Supreme Court of Colorado and Plaintiff in Error in the Supreme Court of the United States.

vs.

ARTIN V. SIDES and WALTER W. SCHERRER, Appellants in the Supreme Court of Colorado and Defendants in Error in the Supreme Court of the United States.

ecipe for Transcript of Record on Writ of Error from the United States Supreme Court.

In accordance with Rule 8 of the Supreme Court of the United ates, Union Pacific Railroad Company, Plaintiff in Error in said ourt, Appellee in the Supreme Court of the State of Colorado, files is its præcipe, indicating the record to be incorporated in the anscript thereof for consideration by the Supreme Court of the nited States on said writ of error, to-wit:

1. Complete record of the trial court, including final judgment, ll of exceptions, appeal orders and appeal bond;

2. Complete record of the Supreme Court of Colorado, including ssignment of errors and all proceedings in the Supreme Court, ncluding stipulation of the parties filed November 27, 1912, opinion of the court and final judgment;

3. All proceedings in the Supreme Court of Colorado subsequent to final judgment, including assignment of errors, etition, bond, writ of error, citation, and all orders and other proeedings relating to said writ of error from the Supreme Court of he United States to the Supreme Court of Colorado, including also his præcipe.

N. H. LOOMIS,
CLAYTON C. DORSEY,
Attorneys for Union Pacific Railroad Company, Plaintiff in Error in the Supreme Court of the United States.

GERALD HUGHES,
Of Counsel.

The undersigned, attorneys and of counsel for the appellants in he Supreme Court of Colorado, who are defendants in error in the upreme Court of the United States, acknowledge service of a copy f the foregoing præcipe this 18th day of July, A. D. 1913, and ereby stipulate that the matters and things therein designated will onstitute a complete transcript of the entire record and proceedngs of the trial court upon which the cause was determined by the upreme Court of Colorado, and also a complete transcript of the ntire record of said Supreme Court of Colorado, including all of the vidence offered, received or considered in either of said courts

in arriving at the final determination of said cause; and do further stipulate that the same shall constitute the transcript of the record to be transmitted to the Supreme Court of the United States on said writ of error.

MILTON SMITH,
CHARLES R. BROCK &
W. H. FERGUSON,
Attorneys and of Counsel for the Appellants in the Supreme Court of Colorado, Who are Defendants in Error in the Supreme Court of the United States.

Filed in Supreme Court Jul- 18, 1913. James R. Killian, Clerk.

66 STATE OF COLORADO, *ss:*

In the Supreme Court.

No. 6952.

MARTIN V. SIDES et al., Appellants,
vs.
UNION PACIFIC RAILROAD COMPANY, Appellee.

I, James R. Killian, Clerk of the Supreme Court of the State of Colorado, do hereby certify that the foregoing transcript contains a true copy of the original transcript of record filed in my office on appeal; all orders of this court entered in this matter; the stipulation as to pleadings filed on the 27th day of November A. D. 1912; the formal opinion of the Court; the original petition for writ of error; the original assignments of error; the original order allowing such writ of error; the original bond filed pursuant to said order; the original citation issued, and a copy of the præcipe under which this transcript is prepared, all of which appears in the records of this Court.

In witness whereof, I have hereunto set my hand as Clerk of this Court and affixed the seal thereof at the City of Denver, State of Colorado, this 29th day of July, A. D. 1913.

[Seal Supreme Court, State of Colorado.]

JAMES R. KILLIAN,
Clerk of the Supreme Court of the State of Colorado.

Endorsed on cover: File No. 23,834. Colorado Supreme Court, Term No. 683. Union Pacific Railroad Company, plaintiff in error, vs. Martin V. Sides and Walter W. Scherrer. Filed August 15th, 1913. File No. 23,834.

Supreme Court of the United States

OCTOBER TERM, 1913

NOS. 682 AND 683

UNION PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR

VS

GEORGE A. SNOW AND ROBERT W. BURTON,
SAID BURTON DOING BUSINESS AS AN INDIVIDUAL
UNDER THE NAME AND STYLE OF THE
BYERS MERCANTILE COMPANY

UNION PACIFIC RAILROAD COMPANY
PLAINTIFF IN ERROR

VS

MARTIN V. SIDES AND WALTER W. SCHERRER

IN ERROR TO THE SUPREME COURT OF THE
STATE OF COLORADO

BRIEF OF PLAINTIFF IN ERROR

N. H. LOOMIS
Of Counsel

C. C. DORSEY
E. I. THAYER
Attorneys for Plaintiff in Error

OMAHA PRINTING CO., OMAHA

CONTENTS OF BRIEF

III.

CASES CITED IN BRIEF

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SUPREME COURT OF THE UNITED STATES

October Term, 1913.

UNION PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

GEORGE A. SNOW and ROBERT W. BURTON, said Burton doing business as an individual under the name and style of The Byers Mercantile Company,
Defendants in Error,

No. 682

UNION PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

No. 683

MARTIN V. SIDES and WALTER W. SCHERRER,
Defendants in Error,

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

BRIEF OF PLAINTIFF IN ERROR

Statement.

The two cases entitled above involve the same question, determinable upon the same facts. Anticipating that they will be heard and decided together, as contemplated by subdivision 8 of rule 26 of this Court, and pursuant to stipulation of counsel heretofore filed herein, plaintiff in error files but one brief, which is intended to cover both cases.

These are suits in ejectment brought by the Railroad Company against the defendants in error to recover possession of two relatively small parcels of land situate in section 8, township 4 south, range 61 west, in the County of Arapahoe, State of Colorado, and lying within and constituting a part of the strip of land 400 feet in width granted to the predecessor in title of the Railroad Company as and for a right of way, by one of the Acts of Congress commonly known as the "Pacific Railroad Acts."

The suits were instituted in the District Court of Arapahoe County, one of the courts of the State of Colorado, on May 9, 1908. The title of the Railroad Company, as specially set up and claimed in the respective complaints, rested upon the grant of right of way made by the Act of Congress entitled, "An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to Secure to the Government the Use of the Same for Postal, Military and other Purposes," approved July 1, 1862 (12 Stat. 489), and the subsequent Acts of Congress amendatory thereof and supplemental thereto, particularly the amendatory Act of July 2, 1864 (13 Stat. 356) and the amendatory Act of July 3, 1866 (14 Stat. 79). These Acts of Congress are expressly referred to and compliance therewith in all particulars specifically averred in the second paragraph of each of the complaints. (See printed records, in No. 682, p. 3; in No. 683, p. 3). Demurrers were filed to the respective complaints, which were overruled. (Printed records, in No. 682, pp. 6, 7; in No. 683, pp. 6, 8). Thereupon answers were filed, identically the same in both cases. (Printed records, in No. 682, p. 8; in No. 683, p. 8).

ach of the answers contained as a first defense a general enial of all of the allegations of the complaint, except those lating to the incorporation of the Railroad Company and e character of the business in which it was engaged, which ere admitted. The second defense in each of said answers t up a statute of limitations of the State of Colorado relat- g to adverse possession. Each of said answers also con- ined a third defense and a counter-claim, which need not considered, because afterward expressly withdrawn by efendants in error. The Railroad Company demurred to e second and third defenses and the counter-claim, which emurrers were sutained. (Printed records, No. 682, p 12; o. 683, pp. 12, 13). The third defense and the counter-claim each case were thereafter expressly by stipulation with- rawn, and therefore require no further consideration. Printed records, No. 682, p. 25; No. 683, p. 26). The rial court having sustained said demurrer to the second efense, setting up the statute of limitations relating to ad- erse possession, the cases came on for trial upon the alle- ations of the respective complaints as put in issue by the eneral denial contained in the first defense. Trial was had the Court upon an agreed statement of facts identical in oth cases. (Printed records, No. 682, p. 19; No. 683, 20). By said agreed statement of facts it was made to ppear that the plaintiff in error was and is the successor title to the original grantee named in the Acts of Congress; at the railroad line in question was in the year 1870 con- tructed across the property described in the respective com- laints, and that the main track ever since has been and is ow in the same location in which it was originally con-

structed, and that ever since its construction it has been and is now continuously operated for railroad purposes; that said railroad is a part of the railroad constructed from the Missouri River at the mouth of the Kansas River westward to a connection with the main line of the Union Pacific as authorized by said Acts of Congress; that the predecessors in title of the plaintiff in error complied in all particulars with the requirements of said various Acts of Congress in said complaint mentioned; "that the plaintiff company (plaintiff in error) is now the owner of the lands, if any, conveyed to said predecessor companies under and by virtue of said Acts of Congress for a right of way;" that the respective parcels described in the complaints lie within a distance of 200 feet from the center line of the main track, but outside of a line 100 feet from said center line; and that the defendants at the time of the commencement of the suits did, ever since have, and do now detain from the plaintiff in error the possession of the premises described in the respective complaints, although demand was made therefor by plaintiff prior to the commencement of the actions.

It will be observed that by said agreed statement it was intended to present, and there was presented, upon undisputed facts, a question of law only. Said question was whether, upon a correct construction of the Pacific Railroad Acts mentioned, there had been any grant of right of way for that portion of the line here involved, and if such grant had been made, whether the right of way so granted was of a width of 200 feet or of a width of 400 feet. The trial court determined this question of law in favor of the Railroad Company, deciding that the right of way granted, extended to

that portion of the line involved herein, and that the strip of land granted for right of way purposes was 400 feet in width, and therefore embraced the property in controversy. As a consequence, on March 26, 1909, judgments were entered in favor of the Railroad Company (plaintiff in error here) and against the defendants (defendants in error here). (Printed records, No. 682, p. 15; No. 683, p. 16). Thereupon the cases were taken by appeal to the Supreme Court of the State of Colorado for a review of the questions of law which had been determined by the trial court upon undisputed facts.

While the cases were pending in the Supreme Court of Colorado upon these appeals, and on June 24, 1912, an Act of Congress was enacted and approved, entitled, "An Act Legalizing certain Conveyances heretofore made by the Union Pacific Railroad Company." (37 Stat. 138, c. 181) Shortly after the passage of this Act of Congress, appellants in the Supreme Court of Colorado (defendants in error here) filed supplemental briefs calling the attention of that Court to said Act of Congress and insisting that by virtue thereof the second defense set up in their respective answers, based upon the statute of limitations of Colorado relating to adverse possession, even though unavailing when interposed and at the time of the trial and judgments in the lower court, had been made valid and conclusive. The Railroad Company combated this position, asserting that said Act of Congress of June 24, 1912, properly construed was not applicable to the situation presented by these records, that said Act of Congress was prospective and not retrospective in its operation, and that if the language of the Act demanded that it be given a retrospective operation and a retroactive effect, the

result as applied to the facts of these cases would be to deprive the Railroad Company of its property without due process of law, contrary to the inhibition contained in the fifth amendment to the Constitution of the United States.

In due time the Supreme Court of Colorado announced its decision. The opinion filed in case No. 682, found in the printed record at page 27, controlled both cases. The Supreme Court of Colorado affirmed the trial court in holding that by the Act of Congress of July 2, 1864, a strip of land for right of way was granted for the railroad line in question and through the premises in controversy; that said strip so granted was 400 feet in width, being 200 feet on each side of the center of the main track of the railroad; that Union Pacific Railroad Company (plaintiff in error here), being the owner thereof as successor in title to the original grantee, was such owner at the time of the commencement of these suits, and continued to be such owner and entitled to the possession of the land in controversy until the passage and approval of the Act of June 24, 1912. The Supreme Court of Colorado also affirmed the trial court in holding that prior to the passage and approval of the Act of Congress of June 24, 1912, the statute of limitations of Colorado relating to adverse possession set up in the second defense in each of the answers was wholly unavailing, and therefore, said defense was properly demurrable. But the Supreme Court further held that, by virtue of said Act of Congress of June 24, 1912, passed more than four years after the commencement of these suits, more than three years after the entry of final judgments therein in the trial court, and almost three years after the records had been lodged in the Supreme

Court of Colorado on appeal, causes of action which had been perfectly good at the time the suits were instituted and tried and judgments entered thereon, had been invalidated; a title which had been beyond question vested in the Railroad Company at the time of the institution of the suits, trial thereof and entry of judgment therein, had been destroyed; paramount and perfect titles, which, prior to June 24, 1912, did not exist, had been created and vested in the defendants in error; and that judgments of the District Court, which at the time they were entered were concededly correct according to settled principles of law which had existed for more than forty years, had been rendered erroneous. Accordingly, the Supreme Court of Colorado reversed the judgment in each of these cases, and exerting a power which under the Colorado practice it clearly possessed, itself entered final judgments against the Railroad Company and in favor of the adverse claimants. To reverse these final judgments the present writs of error are prosecuted.

From the foregoing statement it clearly appears that:

(a) The trial court found and held, and the Supreme Court affirmed, that by the Act of Congress of July 2, 1864, there was granted for the railroad line in question a strip of land for right of way 400 feet in width, which included the premises here in controversy, and that at the time of the commencement and trial of these actions, plaintiff in error was, by virtue of said grant, the owner of the property in controversy and entitled to the immediate possession thereof.

(b) The trial court found and held, and the Supreme Court affirmed, that during the entire period from July 2, 1864, the date of the passage of the original Act, until June

24, 1912, the date of the passage of the latest Act of Congress mentioned above, no Colorado statute of limitation or of adverse possession, or any act or omission within the purview of any such statute, could or did impair, prejudice or in any manner affect said title so vested in the Railroad Company or the right of immediate possession flowing therefrom.

(c) The trial court found and held, and the Supreme Court affirmed, that from July 2, 1864, until the date of the commencement of these actions, and thereafter until June 24, 1912, the Railroad Company and its predecessors in title were, as to the premises in controversy, at all times vested with a perfect title and the right of immediate possession, which title and right had been conferred by the Act of July 2, 1864, and that the defendants in error during all of said period had no title and no right of possession whatsoever.

(d) But the Supreme Court held that the Act of Congress of June 24, 1912, effected a complete transformation; that the title and right of the Railroad Company, perfect for nearly fifty years and up to the very moment of the passage and approval of said Act, was at the instant of such passage and approval immediately annihilated, as though it had never been; that the title and right of the defendants in error, which during the forty-eight years intervening between July 2, 1864, and June 24, 1912, had no existence whatsoever, came into being at the instant of the passage and approval of the Act of Congress of the latter date, and by virtue thereof alone.

The foregoing determinations were made upon facts which were undisputed and indisputable.

It follows from what has been said that these records present in the final analysis a single question. That question

relates to and requires the determination of the scope, the correct construction, and possibly the validity of the Act of Congress of June 24, 1912, hereinabove referred to.

The opinions in the Supreme Court of Colorado are reported as follows:

Snow v. Union Pacific, 133 Pac. 1037.
Sides v. Union Pacific, 133 Pac. 1040.

Specification of Errors.

Identical assignments of error were filed in both cases. These will be found in the printed record in case No. 682 at page 32, case No. 683 at page 30. All of the errors assigned are relied upon and intended to be urged. However, for brevity and convenience, they may be grouped as follows:

First: The Supreme Court of Colorado erred in denying and deciding against the title, right and privilege specially set up and claimed by the plaintiff in error under the Pacific Railroad Acts, and particularly the Acts of July 1, 1862, July 2, 1864, and July 3, 1866. (First, second, eleventh and twelfth assignments.)

Second: The Supreme Court of Colorado erred in holding and deciding that the statutes of limitation of the State of Colorado relating to adverse possession were applicable to or effective against the right and title granted by said Acts of Congress above mentioned, against the contention of the plaintiff in error that said statutes of the state were invalid, inapplicable and inoperative, because repugnant to the Acts of Congress hereinabove specifically mentioned. (Third, fourth, fifth, eleventh and twelfth assignments).

Third: The Supreme Court of Colorado erred in holding and deciding that the Act of Congress approved June 24,

1912, entitled, "An Act Legalizing certain Conveyances heretofore made by the Union Pacific Railroad Company," (37 Stat. 138, c. 181) was applicable to the instant cases, that it was retrospective in its operation and retroactive in effect, and that, operating upon and through the Colorado statute of limitations relating to adverse possession, it gave to circumstances and conditions existing prior to its passage a legal effect, which they did not have at the time they occurred, so potent in character as to deprive the Railroad Company of the title and right with which it had been vested by the previous Acts of Congress, thus denying the right, privilege and immunity specially set up and claimed by the Railroad Company under the said Act of June 24, 1912, that it should be construed prospectively only and in such a manner as not to be applicable to the cases in hand. (Sixth, seventh, eighth, eleventh and twelfth assignments).

Fourth: The Supreme Court of Colorado erred in holding and deciding that said Act of Congress approved June 24, 1912, if given the construction and effect attributed to it by said Supreme Court, as hereinabove stated, was not in conflict with the provisions of the fifth amendment to the Constitution of the United States, prohibiting deprivation of property without due process of law, and in denying the claim of plaintiff in error that said Act of Congress, so construed, was in conflict with the Constitution, thus deciding against the right, privilege and immunity especially set up and claimed by plaintiff in error under said provision of the Constitution of the United States. (Ninth, tenth, eleventh and twelfth assignments).

ARGUMENT.

FIRST POINT.

Jurisdiction of this Court.

In these cases the jurisdiction of this Court is, of course, rested upon section 709 of the Revised Statutes as the same is re-enacted and preserved in section 237 of the Judicial Code, 36 Stat. 1156. That the Court has jurisdiction would seem to be obvious for the following reasons:

First: The Railroad Company's claim of title as specifically set forth was based upon the grant of right of way contained in the Act of July 2, 1864, amendatory of the Act of July 1, 1862, one of the Pacific Railroad Acts, relating to the Union Pacific and its branches. Where the title claimed is based upon these acts and has been denied by the State court, this Court has jurisdiction. It was so held with respect to the grant of odd-numbered sections contained in the Northern Pacific Act.

Northern Pacific v. Colburn, 164 U. S. 383, 385.

It was so held with respect to the grant of right of way contained in the Northern Pacific Act.

Northern Pacific v. Townsend, 190 U. S. 267, 270.
Northern Pacific v. Ely, 197 U. S. 1.
Northern Pacific v. Hasse, 197 U. S. 9.

It was so held with respect to the grant of odd-numbered sections made by the Union Pacific Act.

Missouri Valley Land Co. v. Wiese, 208 U. S. 234, 244.

And it was so held with respect to the grant of right of way made by the Union Pacific Act.

Union Pacific v. Harris, 215 U. S. 386.

See also:

Ross v. Barland, 1 Pet. 656.

Carondelet v. St. Louis, 1 Black 179.

Second: Not only did the Supreme Court of Colorado deny to the Railroad Company its right and title specially set up and claimed under the Pacific Railroad Acts, but that denial was based upon the peculiar construction and effect which the Court gave and attributed to the Act of Congress approved June 24, 1912. This construction and this effect were given to the Act last mentioned, notwithstanding the claim specifically made and urged by the plaintiff in error that the proper construction of the Act was otherwise and that the Act if given the effect attributed to it would be in conflict with the Constitution of the United States. Thus, as we claim, the first federal question was decided erroneously because of an erroneous decision of a second federal question. The situation presented is quite similar to that considered by this Court in the recent case of *St. Louis, Iron Mountain and Southern Ry. Co. v. McWhirter*, 229 U. S. 265, 276. The law is now well settled that where a party to litigation in a State Court insists "upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed by this Court. The plain reason is that in all such cases he has claimed in

the State court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the Act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union."

St. Louis, Iron Mountain and Southern Ry. Co. v. Taylor, 210 U. S. 281, 293.

To the same effect are:

Kansas City Southern v. Albers Commission Co., 223 U. S. 573, 590, 591.

Nutt v. Knut, 200 U. S. 12, 19.

Rector v. City Deposit Bank, 200 U. S. 405, 411.

Eau Claire National Bank v. Jackman, 204 U. S. 522, 531.

Hammond v. Whittredge, 204 U. S. 538, 547.

Third: But in addition, plaintiff in error specifically set up the claim under the Constitution of the United States that if said Act of Congress of June 24, 1912, must necessarily be given the construction and attributed the effect given and attributed by the Supreme Court of Colorado, said Act was in conflict with the fifth amendment to the Constitution of the United States, because it operated to deprive the Railroad Company of its vested property rights without due process of law, and so was beyond the power of Congress to enact. This claim, like the others, was denied by the Supreme Court of Colorado. No citation of authority is required to demon-

strate that thus an additional federal question was raised, and one which, within the provisions of section 709 of the Revised Statutes, endowed this Court with jurisdiction to review.

The Supreme Court of Colorado is the highest court of that state, and therefore the highest court therein in which a decision in these suits could be had.

The judgments entered by the Supreme Court in these cases were intended to be and are final in character and effect.

Beyond question, this Court has jurisdiction to review the decisions.

SECOND POINT.

By the Decision of this Court in Stuart v. Union Pacific, 227 U. S. 312, it was conclusively determined that the Railroad Company was vested with title to and right to possession of the premises here in controversy, by virtue of the grant made by the Act of July 2, 1864 (13 Stat. 356.)

The lands involved herein are situated on that portion of the line of the Kansas Branch of the Union Pacific lying westwardly of the 100th meridian. Said lands are located upon the same portion of the same branch line of railroad, and within a few miles of the lands involved in the case of *Stuart v. Union Pacific*, cited in the foregoing headline. So far as this branch of the controversy is concerned, the cases in hand are in all respects identical with the Stuart case. It follows that the decision in the Stuart case is applicable and conclusive. This, we think, will be conceded by the defendants in error. It also follows that the land here in question, be-

ing within the limits of the 400-foot strip of land described in the Act of Congress, was granted to the predecessor in title of plaintiff in error by the Act of July 2, 1864; that said grant, being concededly prior in point of time to the initiation of the title under which defendants in error claim, was and is superior and paramount thereto, and plaintiff in error and its predecessors in title having concededly complied with all of the conditions annexed to said grant, plaintiff in error is now the owner and entitled to immediate possession of the lands in controversy, unless it has been deprived of said title and right by the subsequent Act of Congress, approved June 24, 1912.

It is a matter of history that the construction of the Pacific Railroads was regarded as a national enterprise; that the construction and continued operation of these railroads was considered important, even essential, to the national safety and welfare. The circumstances and conditions which surrounded and induced the passage of the Pacific Railroad Acts, particularly that relating to the Union Pacific and its branches, which was the first of these; the importance to the nation of the construction and operation of the contemplated railroads; and the difficulty in inducing or procuring the investment of the vast sums of private capital required in what was deemed an uncertain and exceedingly hazardous enterprise, have been heretofore fully explained by this Court.

United States v. Union Pacific, 91 U. S. 72, 79.

United States v. Union Pacific, 160 U. S. 1, 19-21, 26-28.

To procure the necessary investment of capital, substantial inducements were offered to those who would comply with the

terms of the Act of Congress. These inducements or rewards were: (a) The grant of the 400-foot right of way, made by section 2 of the Act of July 1, 1862, (12 Stat. 489); (b) The grant of certain odd-numbered sections of the public lands, made by section 3 of said Act; (c) The grant of bonds of the United States in aid of the construction of said railroad lines, made by section 5 of said Act, and amounting to a large sum per mile of road constructed. Even these inducements, liberal as they seemed, proved insufficient to procure the requisite investment. Accordingly, by the Act of July 2, 1864, (13 Stat. 356) the grant of the odd-numbered sections of land was, by section 4 of the Act, doubled, and provisions respecting the bond aid, by sections 6, 7, 8, 10 and 11 of the Act, made much more liberal, and by section 9 of the Act the branch lines were authorized to build to a connection with the main line at any point westwardly of the 100th meridian, for which additional lines of road they should "be entitled to all the benefits of said act," except that the bond aid was not to be extended to any portion of said branch lines westwardly of the 100th meridian.

The grant of a strip of land 400 feet in width for right of way was not the least important of the inducements offered by these Acts of Congress. As stated by this Court in *Stuart v. Union Pacific*, 227 U. S. 342, at 351, such a grant "is a substantial and obvious benefit." As to that portion of the Kansas line of the Union Pacific here under consideration, the importance of the right of way grant is increased, when we consider that as an aid and inducement to the construction of said line of railroad the projectors did not receive the benefit of

any bonds of the United States, for this aid was by the 9th section of the Act of July 2, 1861, cut off at the 100th meridian. But they were promised and did receive as the reward for their enterprise and courage the grant of the odd-numbered sections, *(United States v. Union Pacific*, 148 U. S. 562) and the grant of the 400-foot right of way made by the Act of July 2, 1864. (Stuart v. Union Pacific, supra.) In other words, the compact entered into by the United States with those to whom the offer was made and who accepted it and complied with its terms, the inducement and reward held out by the United States to those who would risk their fortunes in supplying what was deemed to be a national necessity, was that if the grantees named in the Act of Congress, and their successors, would build the lines of railroad contemplated and thereafter continue to operate the same in the manner and for the purposes described in the Acts, they should receive and thereafter be permitted to hold, a strip of land 400 feet in width for a right of way, and also receive and thereafter be permitted to hold and dispose of the odd-numbered sections of the public lands within certain prescribed limits. The grants made by those Acts of Congress were grants in praesenti, taking effect immediately upon the passage of the respective Acts.

The grant of the right of way was absolute and subject to no conditions or exceptions. The requirements of the Act (all of which were to be fulfilled after the grant became effective) were simply that the railroad should be built within a certain fixed time, along a route specified in a general way, and of a guage to be prescribed; that it should be acceptable to and

accepted by commissioners appointed by the President of the United States, and that after construction it should be continuously operated as a railroad, subject to the usual obligations of a common carrier and subject also to certain special obligations to the United States which were particularly described.

Northern Pacific v. Smith, 171 U. S. 260, 267.

It has been said that the grant of the right of way was also subject to the further implied condition "that the road shall be * * * used for the purposes designed."

Northern Pacific v. Townsend, 190 U. S. 267, 271.
St. Joseph and Denver City R. R. Co. v. Baldwin, 103 U. S. 426.

But in the cases at bar it is conceded that all of these requirements, both express and implied, have been fully and at all times complied with by plaintiff in error and its predecessors. In the agreed statement of facts (printed records, No. 682, p. 19; No. 683, p. 20) it is stipulated that the line of road in question was constructed in the year 1870; that the predecessor in title of the plaintiff in error complied in all particulars with the requirements of the various Acts of Congress; that the plaintiff in error is now the owner of the lands, if any, conveyed to said predecessor companies under and by virtue of said Acts of Congress for a right of way; that the parcels of land here in controversy lie within the limits of the 400-foot strip; that the line of railroad here involved is a part of the railroad constructed from the Missouri river at the mouth of the Kansas river westward to a

connection with the main line of the Union Pacific, as authorized by the said Acts of Congress; and that said line of railroad has been ever since its construction and is now continuously operated as a railroad and its connection with the main line of the Union Pacific is at Cheyenne, Wyoming. It follows from what has been said that the questions presented in these records are confined within a very narrow scope. Briefly stated, the situation is this:

The United States conveyed to the predecessor of plaintiff in error a strip of land 400 feet in width; the United States entered into a solemn compact with said predecessor that it and its successors in title should be vested with the title thereto and the complete right of possession thereof, in perpetuity, provided only that they should build, equip, maintain and operate a certain line of railroad thereon. Plaintiff in error and its predecessors in title have fully complied in every particular with all of the requirements of said compact on their part to be performed. This has been done at great expense of money, of labor, and even of life. The grant made by the United States was not a gratuity. It was earned. A heavy price was paid therefor by the grantee and its successors. This was received and is still retained and enjoyed by the United States. Beyond question, up to the very moment of the passage of the Act of Congress approved June 24, 1912, plaintiff in error, as successor to the original grantee, was vested with the title and right of possession which had been conferred by the United States under the circumstances and for the considerations described above.

The said Act of Congress of June 24, 1912, will presently be referred to at greater length. The question which these

records present must be determined in the light of the circumstances and conditions hereinabove recited. That question is this: DID CONGRESS BY THE ACT OF JUNE 24, 1912, INTEND AND ATTEMPT BY LEGISLATIVE ACT SUMMARILY TO DIVEST THE UNION PACIFIC OF THE PROPERTY WHICH IT AND ITS PREDECESSORS HAD EARNED AND PAID FOR, AND WITH WHICH IT AND ITS PREDECESSORS HAD BEEN VESTED FOR ALMOST FIFTY YEARS, WITHOUT CAUSE, WITHOUT JUDICIAL INQUIRY, AND WITHOUT OPPORTUNITY TO DEFEND? IF CONGRESS DID SO INTEND AND ATTEMPT, WAS AND IS THE ACCOMPLISHMENT OF SUCH A PURPOSE WITHIN ITS CONSTITUTIONAL POWERS?

THIRD POINT.

Nature and attributes of the title to the right of way vested by the Act of July 2, 1864.

The fee passed by the grant of right of way made by the Act of July 2, 1864.

Northern Pacific v. Townsend, 190 U. S. 267, 271.

New Mexico v. U. S. Trust Co., 172 U. S. 171, 181.

Western Union Tel. Co. v. Pennsylvania Co., 195 U. S. 540, 570.

True, it is said in the Townsend case, supra, that "the grant was of a limited fee," the limitation being that it was to be perpetually held and used for the purposes for which it was granted, to-wit, for the right of way of the railroad authorized and contemplated in the Act of Congress, and that portions thereof could not be voluntarily or involuntarily alienated so as "to confer a permanent right of possession to any portion thereof upon an individual for his private use." Except for this limitation, the fee was unqualified. There has never

been any attempt on the part of the Railroad Company to alienate any portion of the right of way here in controversy, nor has there ever been any failure to use the right of way for the purposes contemplated by the act, to-wit, the continued operation of the line of railroad thereover. But, while it is true that portions of said right of way were inalienable, in the sense that they were inseparably attached to the railway itself and the franchise to operate the same, yet it is also true that the alienation and the transfer of the title and possession of the railroad property as an entirety, including both the railway itself, the franchise and the right of way, was contemplated and authorized, and the right so to do was actually exercised. The right was conferred to mortgage the entire property, including the right of way, and it was mortgaged by the original grantees in the Act, to procure necessary funds for construction. The United States was itself thereby secured for the advances in the form of government bonds made in aid of these railroads. By foreclosure of these mortgages and by master's deeds pursuant thereto the entire property has passed into the ownership of the plaintiff in error, including the right of way. By virtue of these conveyances, present Union Pacific Railroad Company, purchaser at foreclosure sale and successor by conveyances of the original grantee, owns the entire property, including the right of way, and maintains and operates the same, upon the same tenure and subject to the same public duties as when the property was in the hands of the original grantee.

Union Pacific v. Mason City and Ft. Dodge Co., 128 Fed. 230, 238.

Union Pacific v. Mason City and Ft. Dodge Co., 199 U. S. 160, 168.

United States v. Union Pacific, 226 U. S. 61, 91, 92.

And present Union Pacific Railroad Company, having acquired the property in the manner aforesaid, has exercised its unquestionable right to again mortgage the same, including the right of way, and it is common knowledge that there are now outstanding against said property securities in the form of bonds and stock representing the investment of millions of dollars, upon the faith of the titles so vested and transferred.

But the title thus vested by the Pacific Railroad Acts possessed certain peculiar attributes inherent in the Acts making the grant and expounded by repeated decisions of this court.

It was unnecessary for the Railroad Company, grantee in the Act, or its successors, to occupy all of said 400-foot strip so long as the Railroad Company continued to operate through the same the one line of railroad track contemplated and required by the Act. No private rights could be initiated or could arise by reason of the failure of the Railroad Company to occupy said strip of land to its full width.

Northern Pacific v. Smith, 171 U. S. 260, 267.

No state statute of limitations or relating to adverse possession could "operate to confer a permanent right of possession to any portion thereof upon an individual for his private use. * * * Congress having plainly manifested its intention that the title to and possession of the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by

individuals of portions of the right of way cannot be treated without overthrowing the Act of Congress as forming the basis of an adverse possession which may ripen into a title good as against the Railroad Company."

Northern Pacific v. Townsend, 190 U. S. 267, 271, 272.

Even though such adverse possession be accompanied by the construction at great expense of valuable and permanent improvements, such as buildings in the City of Spokane, and by other acts in addition to those required by the state statute of limitations, which, under ordinary circumstances, would operate as an estoppel, nevertheless, the rule is not changed, and the Railroad Company's title and right to possession remained unaffected.

Northern Pacific v. Ely, 197 U. S. 1, 3, 4, 5.

"Possession of portions thereof [of the right of way] by individuals was not adverse in the sense that it might ripen into title; nor, however long it was permitted to continue, did it preclude the Railroad Company from performing its duty by asserting its right thereto whenever the necessity for the full use arose. That for a long time it maintained its right of way fences within the exterior limits of the strip gave the adjacent land owners nothing more than a permissive use of the unenclosed portions, and when it became inconsistent with the public use to which the right of way was dedicated by Congress, the railroad company properly removed its fences and resumed possession."

Kindred v. Union Pacific (C. C. A. 8th Cir.) 168 Fed. 648, 653, 654.

Same Case Affirmed, 225 U. S. 582, 597.

Stuart v. Union Pacific, 227 U. S. 342, 353.

Throughout the entire period from July 2, 1864, until June 24, 1912, the inherent nature, the inseparable attributes of the title to the right of way as set forth in the Act of Congress and repeatedly announced by this Court, were such that so long as the railroad should continue to be operated no adverse possession or compliance with provisions of any State statute of limitations relating thereto, no laches or acquiescence, however long continued, no estoppel, of whatever it might consist, could operate to divest or in any manner affect the title of the Railroad Company to the entire width of said right of way or any part thereof, or its right to make use of said entire width for its railroad purposes, whenever it might choose to do so. These characteristics, being inherent in the grant and arising from the Act of Congress which made the grant, were part of the compact between the United States and the Railroad Company, grantee, its successors and assigns. Upon these characteristics and attributes of the title as expressed in the Act of Congress and as frequently enunciated by this Court, the Railroad Company was entitled to and did rely during all the forty-eight years which elapsed between July 2, 1864, and June 24, 1912. The Railroad Company was under no obligation to maintain an actual and exclusive possession of the entire width of 400 feet. It could with safety leave it unfenced and open. It could with safety place its fences on lines parallel with and fifty feet distant on either side from the Railroad track, leaving the remaining portion of the 400 feet unenclosed. It could with safety and profit to itself and with advantage to the community through which its road was operated, permit the outer portions of the 400-foot strip to be cultivated or other-

wise used by the adjoining land owners until the time arrived to actually occupy the same with tracks and other railroad structures. It was entitled to rely and did rely upon the language of the Act of Congress and the decisions of this Court which made it impossible for any adverse rights to arise from or be based upon anything whatsoever which it might permit to be done by others within the limits of its 400-foot right of way.

If the original grantee, immediately upon construction of the railroad, had built fences on either side of its track at the outer limits of the 400-foot strip and if said fences had thereafter been continuously maintained by the Railroad Company and its successors, would anyone venture to assert that the Congress of the United States could legislate the title to any portion of said right of way vested by the original Act of Congress away from the grantee or its successor and resume said title for the United States or grant it to another?

But the characteristics and attributes of the title conveyed by the Act of July 2, 1864, were such during all of the time which elapsed from the date of the original grant until June 24, 1912, that the entire width of 400 feet of said right of way was thereby as effectually protected against invasion by others and against the vesting of any adverse rights in others to any portion of said right of way, as though such fences had at all times been maintained. We must consider and determine these cases as though the Railroad Company had always maintained an effectual barrier at the outer limits of the property and had always excluded every invader, and so considering them, this Court cannot affirm the judgments of the Supreme Court of Colorado unless it is able to say that

under such circumstances it would have been within the power of Congress, arbitrarily, without reason or legal process, to deprive the Union Pacific of three-quarters of the land which it and its predecessors had earned by due compliance with previous Acts of Congress.

FOURTH POINT.

The Act of June 21, 1912 (37 Stat. 138, C. 181) analyzed and its application to these cases considered.

The Act in question is short. As will be observed, the following matters and those only are treated in said act:

By the first portion of section 1 certain "conveyances or agreements" are validated and confirmed.

By the second portion of section 1 it is provided that State statutes relating to adverse possession "shall have the same effect as though the land embraced within the lines of said right of way had been granted by the United States absolutely or in fee, instead of being granted as a right of way."

By section 2 of said Act, it is provided "that any part of the right of way heretofore mentioned which has been, under the law applicable to that subject, abandoned as a right of way, is hereby granted to the owner of the land abutting thereon."

Section 3 of the Act provides that nothing in the Act contained shall be effective to diminish said right of way to a less width than 100 feet.

It is obvious that one portion only of the Act can by any possibility have application to the cases now under consideration, to-wit, that portion of section 1 which relates to adverse pos-

session and State statutes upon that subject. We have here no conveyance or agreement to be ratified, validated or confirmed by the first portion of section 1. There is no claim of abandonment, nor can any be made. There is no allegation of abandonment, nor is there any fact which would sustain such allegation if made. Abandonment, like equitable estoppel, must be specially pleaded, and there is no such plea.

We deny the efficacy of a subsequent Act of Congress to make that abandonment which was not such at the time it occurred. But section 2 of the Act of Congress treats only of any part of the right of way "which has been *under the law applicable to that subject* abandoned as a right of way." It is clear beyond question that "under the law applicable to that subject" as it existed prior to June 24, 1912, no part of said right of way had been "abandoned as a right of way." The fact that these suits to recover possession had been brought more than four years prior to the Act of June 24, 1912, conclusively negatives any intention to abandon. Moreover, the line of railroad contemplated and required by the Act had been continuously maintained and operated. This was "an assertion of right to the entire width of its right of way," and was "the defiant badge of ownership" of the whole 400 feet which the Act of Congress granted.

Southern Pacific v. Hyatt, 132 Calif. 240.

Pennsylvania Co. v. Freeport, 138 Pa. St. 91.

Slocomb v. *C. B. & Q.*, 57 Iowa 675.

East Tennessee Co. v. Telford, 89 Tenn. 293.

L. & N. R. R. Co. v. French, 100 Tenn. 209.

Sapp v. Railroad, 51 Md. 115.

Union Pacific v. *Kindred*, 43 Kansas 134.

McLucas v. St. Joseph and Grand Island, 67 Neb. 603.

Roberts v. Sioux City and Pacific, 73 Neb. 8.

Moran v. C. B. & Q., 83 Neb. 680.

The Act of Congress contemplated and required the construction and operation of a single track railroad only. Nevertheless, in *Northern Pacific v. Smith*, (171 U. S. 260, 275), this Court said:

> "By granting a right of way 400 feet in width Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance,"

to which language this Court, in *Northern Pacific v. Townsend*, 190 U. S. 267, at 272, later added:

> "Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad and title to it has vested in whomsoever chooses to occupy the same. * * * Congress having plainly manifested its intention that the title to and possession of the right of way should continue with the original grantee, its successors and assigns, *so long as the railroad was maintained*, the possession by individuals of portions of the right of way cannot be treated without overthrowing the Act of Congress as forming the basis of the adverse possession which may ripen into a title good as against the railroad." (Italics ours.)

In *Kindred v. Union Pacific*, 168 Fed. 648, at 654, the Circuit Court of Appeals for the Eighth Circuit made use of like language, to which it added:

> "That for a long time it maintained its right of way fences within the exterior limits of the strip gave the

adjacent land owners nothing more than a permissive use of the unenclosed portions,"

and that decision was recently affirmed by this Court.

Kindred v. Union Pacific, 225 U. S. 582.

See also:

Stuart v. Union Pacific, 227 U. S. 342, 353.

A fortiori must it be true, as it seems to us, that the mere fact that the Railroad Company has for a period of years failed to lay its tracks or place other railroad structures to the outermost limits of the 400 feet cannot operate as an abandonment which may vest the title in third persons or revest it in the United States. The Act contains no condition, either express or implied, that all parts of the right of way should be occupied with tracks within a certain period of years. The sole condition was that the railroad should be constructed thereover and continuously operated under the conditions and for the purposes contemplated by the Act. By compliance with that condition, the Railroad Company asserted, protected and maintained its right to the entire width of 400 feet. How, then, could it be said that by any act or omission of the railroad, charged as having occurred prior to June 24, 1912, its intention to abandon any of the width of right of way so conclusively determined to be necessary, could be evidenced? The railroad was entitled to rely upon such conclusive determination, notwithstanding any conjecture to the contrary indulged in, either by courts, juries or the general public, and as a consequence could safely leave them to make such conjectures as they might see fit. Whether this condition is changed by the Act of June 24, 1912, in respect of matters which may occur subsequent to its passage is an-

other question not involved in these proceedings, but we respectfully submit that prior to the date of that Act no abandonment had occurred or could occur "under the law applicable to that subject."

It follows that the only portion of the Act of June 24, 1912, which could by any possibility be claimed to be applicable, and, indeed, the only portion of said Act which is, in fact, claimed to be applicable to the cases now under consideration, is that part of the first section of the Act relating to the effect of State statutes respecting adverse possession.

FIFTH POINT.

The line of Railroad here involved is in terms expressly excluded from the operation of the Act of June 24, 1912.

Recurring once more to an analysis of said Act, it plainly appears that the portions of the right of way of the Union Pacific to which it is intended to apply are definitely specified in the first portion of section 1 thereof. It is there provided that "all conveyances or agreements heretofore made * * * of or concerning land forming a part of the right of way of the Union Pacific Railroad Company granted by the Government by the Act of Congress of July 1, 1862, entitled, 'An Act to Aid the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean and to Secure to the Government the Use of the Same for Postal, Military and other Purposes;' and also all conveyances or agreements heretofore made * * * of or concerning land forming a part of the right of way between Denver, Colorado, and Cheyenne, Wyoming, of any of said companies, granted

by or held under any Act of Congress," are legalized, validated and confirmed. It thus appears that the only portions of the right of way within the scope of the Act are:

First: Those portions granted by the Act of July 1, 1862; and,

Second: The right of way between Denver and Cheyenne, by whatever Act of Congress it may have been granted.

But it must be borne in mind that the Act of July 1, 1862, made no grant of right of way for that portion of the Kansas line westwardly of the 100th meridian (which is the line here involved). The right of way for that portion of the line involved herein, was granted by the Act of July 2, 1864, whereby the right of way was granted for the entire line from the 100th meridian westwardly through Denver, thence northerly to Cheyenne, where a connection was made with the main line of the Union Pacific. The grant was an entirety, though subsequently by express authority of Congress that portion of the same pertaining to the line between Denver and Cheyenne was conveyed by the Kansas Pacific to the Denver Pacific.

United States v. Union Pacific, 37 Fed. 551.
United States v. Union Pacific, 148 U. S. 562.
Stuart v. Union Pacific, 178 Fed. 753, 755, 759.
Stuart v. Union Pacific, 227 U. S. 342, 346, 353.

But the only portion of the right of way granted by the Act of July 2, 1864, to which the Act of June 24, 1912, is by its terms made applicable, is that part of the right of way "between Denver, Colorado, and Cheyenne, Wyoming." Clearly all other portions of the right of way granted by the Act of July 2, 1864, including that portion of the same in-

volved in these suits, was and was intended to be excluded from the operation of the recent Act. The doctrine "*expressio unius est exclusio alterius*" is distinctly applicable.

As we proceed with the reading of the Act of June 24, 1912, it is perceived that in all the remaining portions of the Act reference is had to the descriptive words contained in the first part of section 1 to determine the territorial scope of the enactment. Thus, in the latter portion of section 1 it is provided that "any part of said right of way heretofore mentioned" shall be subject to the operation of State statutes of limitation relating to adverse possession. By section 2 of the Act it is provided "that any part of the right of way heretofore mentioned" shall be subject to abandonment. It is only the right of way granted by the Act of July 1, 1862, and only that part of the right of way granted by the Act of July 2, 1864, which lies between Denver and Cheyenne, which is at all affected or intended to be affected by the Act of June 24, 1912. Inasmuch as the right of way here in controversy was not granted by the Act of July 1, 1862, and inasmuch as the lands here in controversy are adjacent to the line east of Denver and not that between Denver and Cheyenne, it clearly appears that the recent Act of Congress can have no application to the cases now under consideration. What reason Congress may have had for excluding from the operation of the Act that portion of the line of railroad here under consideration, the courts may not inquire. The fact that Congress has explicitly specified and described the portions of the right of way upon which it intends the Act to operate is conclusive that it does not intend the Act to operate elsewhere. In view of the obvious hardship and injustice

which would follow if the Act be given the retrospective and retroactive effect attributed to it by the Supreme Court of Colorado, this Court should not, we submit, extend its operation to territory which Congress has apparently seen fit to exclude therefrom.

> "Lord Brougham said: 'If we depart from the plain and obvious meaning, we do not in truth construe the Act, but alter it. We supply a defect which the legislature could easily have supplied, and are making the law, not interpreting it.' 'We are bound,' said Buller, J., 'to take the act of parliament as they have made it; a *casus omissus* can in no case be supplied by a court of law, for that would be to make law.' It will make no difference if it appears that the omission on the part of the legislature was a mere oversight, and that without doubt the Act would have been drawn otherwise had the attention of the legislature been directed to the oversight at the time the Act was under discussion."
>
> *Lewis' Sutherland Statutory Construction*, vol. 3, (2d ed.) pages 1108-1109.

SIXTH POINT.

The Act of June 24, 1912, correctly construed, is not retrospective in its operation, and therefore is inapplicable to the cases in hand.

As hereinbefore pointed out, only one portion of said Act of June 24, 1912, is or can be claimed to be applicable here. That is the portion of section 1 of the Act relating to the effect to be given to State statutes of limitation respecting adverse possession. For convenience, we here quote that portion of said Act:

"That in all instances in which title or ownership of any part of said right of way heretofore mentioned is claimed as against said corporations or either of them, or the successors or assigns of any of them, by or through adverse possession of the character and duration prescribed by the laws of the state in which the land is situated, such adverse possession shall have the same effect as though the land embraced within the lines of said right of way had been granted by the United States absolutely or in fee, instead of being granted as a right of way."

The Colorado statute relating to adverse possession referred to by said Act of Congress and relied upon by the second defense in each of the answers filed by defendants in error, will be found in Revised Statutes of Colorado, 1908, page 1033, section 4089. It reads as follows:

"Every person in the actual possession of lands or tenements, under claim and color of title, made in good faith, and who shall, for seven successive years, continue in such possession, and shall also, during said time, pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession, and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section."

This Colorado statute was enacted in 1893, but it took the place of a former statute originally enacted in 1874, which was in all respects substantially the same as the pres-

ent statute, except that the prescribed period was five years instead of, as now, seven years.

Session Laws, 1874, p. 177, sec. 1.
General Laws, 1877, p. 600, sec. 1694.
Gen. Stat. 1883, p. 675, sec. 2186.

The second defense in each of the answers set forth facts which, if established, brought the case of each of the defendants within said Colorado statute relating to adverse possession. The trial court sustained demurrers interposed by the Railroad Company to said second defenses, and defendants in error elected to stand upon said defenses as interposed. The trial court sustained the demurrers because, as the law then was and ever since June 2, 1864, had been, State statutes of limitation and adverse possession, like that of Colorado here involved, were totally ineffective as against the title vested by the right of way grants contained in the Pacific Railroad Acts, as this Court had frequently and conclusively determined. When the cases reached the Supreme Court of Colorado, that Court held, as had the trial court, that, according to the law as it existed at the time of the commencement of the actions, at the date of the hearing upon the demurrers, the trial and the entry of judgments below, and at all times until the passage of the Act of June 24, 1912, the trial court was entirely correct in sustaining said demurrers to the second defense in each of said answers, because at all times prior to the passage of said Act of June 24, 1912, the Colorado statute pleaded and relied upon was totally ineffective.

It has thus been conclusively determined by the Colorado courts that said Colorado statute is in no way distinguishable from similar statutes of other states heretofore considered by this Court, and held to be ineffective against the Railroad Company's title to the right of way.

But the Supreme Court of Colorado held that by some peculiar magic concealed in the words of the Act of Congress of June 24, 1912, said Act reached back into the past, and by a mysterious process of alchemy, not unlike the transmutation of metals, converted that which was dross into the pure gold of perfect title, made of acts, omissions and conditions perfectly innocuous and ineffective when they occurred perfect and conclusive defenses, destroyed utterly causes of action in every respect good at the time suits thereon were instituted and judgments thereon entered in the trial court, totally annihilated a title vested nearly fifty years before and continuously held thereafter, and created in others a new title to the same property which had never before had any existence whatsoever.

In order to accomplish this remarkable result the Supreme Court of Colorado necessarily gave to the Act of Congress of June 24, 1912, a retrospective operation and a retroactive effect. Indeed, it was necessary for the Supreme Court to hold, and it did hold, that said Act of June 24, 1912, produced all of the amazing consequences recited above, by reaching back into the past and operating upon acts, omissions and conditions which had entirely ceased to exist more than four years prior to the passage of said Act of Congress. These suits were begun on May 9, 1908. The Act of Congress

in question was passed and approved on June 24, 1912. It is obvious that no act, omission or condition occurring or existing subsequent to the beginning of these suits can be considered for the purpose of determining whether the Colorado statute relating to adverse possession had been complied with. The law is well settled that the full period required by said statute must have elapsed and all of the conditions set forth in said statute must have been concurrently fulfilled for the prescribed time prior to the commencement of an action by the true owner to recover the premises. The Colorado statute in question was adopted from Illinois.

Knight v. Lawrence, 19 Colo. 425, 431.

The Illinois statute before its adoption in Colorado had been construed by the Supreme Court of Illinois to require that the entire statutory period must have elapsed and all of the things required by the statute concurrently done during the prescribed period prior to the commencement of the action.

Clark v. Lyon, 45 Ill. 388. (Decided in 1867.)

Berg v. Webb, 96 Ill. 415.

Holbrook v. Debo, 99 Ill. 372.

The statute has received the same construction in Colorado since its adoption there.

Sage v. Sage, 47 Colo. 559, 567, 568.

Webber v. Wannemaker, 39 Colo. 425, 427, 432.

Denver and Rio Grande v. Doelz, 49 Colo. 48, 50.

Johnson v. Gibson, (Colo. App.) 133 Pac., 1052.

We respectfully submit that the Act of Congress of June 24, 1912, is not subject to the construction attributed to it by the Supreme Court of Colorado. We are concerned with no part of said act except that portion quoted above, which

deals with adverse possession. No language contained therein imperatively demands or persuasively leads to a retrospective construction. A consideration of the language employed indicates that this portion of the act was intended to have a prospective and not a retrospective operation. Doubtless Congress had in mind and gave due consideration to the exceedingly unjust results which would follow if the Act in this particular were retrospective. Consequently, the language looks to the future. It is said clearly that "adverse possession of the character and duration prescribed by the laws of the state * * * *shall have* the same effect," etc. It is not provided that such adverse possession which had terminated more than four years prior to the passage of the act did have such effect. Not only is the language here employed fairly subject to the construction that the act was to operate prospectively, but we submit no other reasonable construction is possible.

It is well settled that an Act of Congress will not be construed as having a retrospective operation unless the language imperatively demands it. In *United States v. Burr*, 159 U. S. 78, 82, it is said:

> "It is conceded that the general rule is, as stated in United States v. Heth, 3 Cranch, 398, 413, that 'words in a statute ought not to have a retrospective application unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.'"

See also:

United States v. American Sugar Co., 202 U. S. 563, 577.

This is true even though the language employed be fairly subject to the other construction.

> "Even though the words of a statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may hereafter arise, unless the language employed expresses a contrary intention in unequivocal terms."
>
> *Twenty Per Cent Cases*, 20 Wall. 179, 187.

And the rule is always applied where the result of a retrospective operation would be to injuriously affect an existing status. This thought is expressed in *United States v. Heth*, supra (3 Cranch 413), as follows:

> "This rule ought especially to be adhered to when such a construction will alter the pre-existing situation of parties, or will affect or interfere with their antecedent rights, service and remuneration; which is so obviously improper, that nothing ought to uphold and vindicate the interpretation, but the unequivocal and inflexible import of the terms and the manifest intention of the legislature."

The rule is thus expressed by a distinguished writer upon the subject:

> "A statute will be construed to operate *in futuro*, only (that is, it will not be given a retroactive effect by construction) unless the legislature has so explicitly expressed its intention to make the act retrospective, that there is no place for a reasonable doubt on the subject."
>
> *Black's Constitutional Law*, (2d Ed.), p. 627, sec. 286.

The records of this Court will disclose, and the members of the Court may recollect, that in *Stuart v. Union Pacific*,

227 U. S. 342, the same contentions as are here set forth respecting the act of June 24, 1912, were advanced by the Railroad Company and earnestly supported by like arguments of its counsel, both in the printed briefs and orally. The Court in that case held (p. 354) that the Act of June 24, 1912, was not involved. But to us it is significant that in the case of *Winfree v. Northern Pacific*, which was submitted the next day after the argument in the Stuart case, and which was decided on the same day with the Stuart case, the opinions in both cases being delivered by Mr. Justice McKenna, the following language was employed with respect to retrospective statutes (227 U. S. 296, 301):

> "It is hardly necessary to say that such statutes are exceptions to the almost universal rule that statutes are addressed to the future, not to the past. They usually constitute a new factor in the affairs and relations of men, and should not be held to affect what has happened, unless, indeed, explicit words be used or by clear implication that construction be required. It is true that it is said that there was liability on the part of the defendant for its negligence before the passage of the act of Congress and the act has only given a more efficient and a more complete remedy. It, however, takes away material defenses, defenses which did something more than resist the remedy; they disproved the right of action. Such defenses the statute takes away, and that none may exist in the present case is immaterial. It is the operation of the statute which determines its character. The Court of Appeals aptly characterized it, and we may quote from its opinion (173 Federal Reporter 66): 'It is a statute which permits recovery, in cases where recovery could not be had before, and takes from the defendant defenses which

formerly were available, defenses which in this instance existed at the time when the contract of service was entered into and at the time when the accident occurred.' Such a statute, under the rule of the cases, should not be construed as retrospective. It introduced a new policy and quite radically changed the existing law."

The foregoing observations were made with respect to the Employers' Liability Act of April 22, 1908, and notwithstanding the fact that said Act had been considered by this Court as remedial in character.

Mondou v. N. Y., N. H. & Hartford, 223 U. S. 1.

Moreover, there is another rule of construction, settled by repeated decisions, which is thus expressed by the author quoted from above:

"Unconstitutionality will be avoided, if possible, by putting such a construction on the statute as will make it conform to the constitution. The courts will not so construe the law as to make it conflict with the constitution, but will rather put an interpretation upon it as will avoid conflict with the constitution and give it the force of law, if this can be done without extravagance. They may disregard the natural and usual import of the words used if it is possible to adopt another construction sustaining the statute which shall not be strained or fantastic. In so doing they construe the act in accordance with the presumed intention of the legislature, for the law-making body is always presumed to have acted within the scope of its powers."

Black's Constitutional Law, (2d ed.), p. 60, sec. 37.

See also:

Miller v. U. S., 11 Wallace 268, 309.

U. S. v. Coombs, 12 Peters 72.

Grenada County Supervisors v. Brogden, 112 U. S. 261, 268.

Chesapeake & R. Co. v. Kentucky, 179 U. S. 388, 394.

The Japanese Emigrant Case, 189 U. S. 86, 101.

To bring into operation the canon of construction last above referred to, it is wholly unnecessary for the Court actually to determine that the statute, if given a retrospective construction, would be unconstitutional. The rule as expressed by this Court is that:

> "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter."
>
> *United States v. Delaware and Hudson Co.*, 213 U. S. 366, 408.
>
> *Harriman v. Interstate Commerce Commission*, 211 U. S. 407.
>
> *Knights Templar's Indemnity Co. v. Jarman*, 187 U. S. 197, 204.

That the act in question if given a retrospective operation and retroactive effect, such as was attributed to it by the Supreme Court of Colorado, would be unconstitutional, we submit to be clear upon the authorities to be cited in the next succeeding portion of this brief. We therefore earnestly contend that canons of statutory construction firmly settled and universally accepted require that the Act of June 24, 1912, be construed prospectively rather than retrospectively.

if by any possibility its language will permit such construction. We submit that not only will the language admit of a prospective construction, but that such is the reasonable intendment of the words used. Indeed, it seems to us impossible under any circumstances to attribute to the language employed a retrospective meaning. If we are correct in this, then it seems obvious that the Act of June 24, 1912, can have no application to the cases in hand, and they must be determined upon the law as it stood prior to the passage of said act.

SEVENTH POINT.

If the Act of June 24, 1912, requires the retrospective construction and is to be given the retrospective effect attributed to it by the Colorado Supreme Court, it is unconstitutional and beyond the power of Congress to enact.

The fifth amendment to the Constitution of the United States provides that "no person * * * shall be * * * deprived of life, liberty or property without due process of law." But in the instant cases if the statute in question be given a retrospective operation, notwithstanding the clear import of its terms, the result would be to deprive the plaintiff in error of a vested property right without due or any process of law. As applied to the facts of these cases, the statute, if given the operation, construction and effect contended for by the defendants in error and attributed to it by the Supreme Court of Colorado, would be equivalent to a legislative act declaring baldly that "property which heretofore for nearly fifty years has been and is now vested in Union

Pacific Railroad Company shall be and hereby is taken from said Railroad Company and vested in" certain other designated persons.

The title of the Union Pacific to its 400-foot right of way is a vested property right, as is its title to the odd-numbered sections of land, both being granted by the same Acts of Congress and by similar words of grant, operating *in praesenti*. This has been held repeatedly, both in respect to the odd-numbered sections and in respect to the 400-foot right of way.

The title to the 400-foot right of way became vested in the grantee immediately upon the passage of the Act of Congress. It was subject to no conditions except those expressly named in the Act. The title so received was such—and it was then, ever since has been, and is now held upon such tenure—that no possession of any part of said right of way was or could be adverse, nor, however long continued, did or could serve to divest any right of the Railroad Company therein, or to vest any such right in another, either at law or in equity; that no laches or acquiescence on the part of the Railroad Company, however long continued, could or did in any manner affect its title to said right of way, or its right to use the same for railway purposes to its utmost limits; and that no estoppel, of whatever act or omission it might consist, or however long such acts or omissions might have continued, could possibly, or did, in any way operate to limit or affect the title of the Railroad Company in any degree.

In short, the title and the tenure were and are such that during the entire period of time from the original grant up to the present day none of the acts or omissions mentioned in

the Act of June 24, 1912, or in the Colorado statute to which it refers, could or did have the slightest effect upon the title of the Railroad Company and its successors. That title remained and remains undiminished and unimpaired, unless destroyed by said Act of Congress. These propositions are settled beyond the possibility of a doubt.

Northern Pacific v. Townsend, 190 U. S. 267.
United States v. Michigan, 190 U. S. 379, at 398.
Baltimore Co. v. Baltimore, 195 U. S. 375, at 382.
Northern Pacific v. Ely, 197 U. S. 1, 5.
Northern Pacific v. Hasse, 197 U. S. 9.
Kindred v. Union Pacific, 168 Fed. 648, 652.
Kindred v. Union Pacific, 225 U. S. 582, 597.
Union Pacific v. Karges, 169 Fed. 459.
Stuart v. Union Pacific, 178 Fed. 753.
Stuart v. Union Pacific, 227 U. S. 342, 353.
Mullen v. Bromley, 21 Colo. App. 399, 407-410, 122 Pac. 66, 69, 70.

If the statute in question be given a retrospective operation, past acts and omissions will thereby have a different legal effect, in respect to said right of way and the title thereto, from that which such acts and omissions could possibly have had at the respective dates when they occurred. In other words, by the operation of the statute so construed, property which is today vested in the Union Pacific Railroad Company would, immediately upon the passage and approval of said act, and by virtue thereof alone, be taken from the Union Pacific and vested in others.

That Congress has not the power to accomplish this without the consent of the present owner of the property would seem to be perfectly obvious, and the Supreme Court has expressly so held in respect of the very same Acts of Congress, concerning the Union Pacific Railroad Company, to which the statute in question is directed. In the *Sinking Fund Cases*, 99 U. S. 700, at 718, this Court, speaking through Mr. Chief Justice Waite, said:

> "The United States cannot, any more than a State, interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given to this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that the term implies, as it would be if the repudiator had been a state or municipality or a citizen. *No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable.*" (Italics ours.)

And in *United States v. Union Pacific*, 160 U. S. page 1, this Court, speaking of the reserved right of Congress to alter or amend the Union Pacific Acts, said (p. 33):

"It would not be competent for Congress, under the guise of altering and amending the act in question, to impose upon the railroad company duties wholly foreign to the objects for which it was created or for which governmental aid was given. *Neither could it, by such alteration or amendment, destroy rights actually vested, nor disturb transactions fully consummated.* We may here, not inappropriately, repeat what was said in the Sinking Fund Cases, 99 U. S. 700, 718, 719, 720, that 'this power has a limit,' and '*cannot be used to take away property already acquired under the operation of the charter, or* to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made.' Again, in the same case:" (Here follows the quotations from the Sinking Fund Cases hereinbefore made.) (Italics ours.)

See also:

Wallbridge v. Board of Commissioners, 74 Kan. 341, 86 Pac. 473.

But the title to the right of way was a title acquired and a property right vested, not only "under the operation of the charter," but by virtue thereof, and by the very terms of the Act of Congress which constituted such charter.

Titles vested under such Act of Congress could not, without the consent of the grantee or its successor, be legislated back to the United States, or legislated into the ownership of anyone else; nor could the title or tenure created by the grant of said lands or right of way be changed, without such consent, by a subsequent Act of Congress.

These are not new principles, nor are they applicable solely to the rights of Union Pacific Railroad Company. As was

said by this Court in Farrington v. Tennessee, 95 U. S. 679, 683:

> "The doctrine of the sacredness of vested rights has its root deep in the common law of England, whence so much of our own has been transplanted. Kent, then Chief Justice, said: It is a principle of that law, 'as old as the law itself, that a statute even of its omnipotent Parliament is not to have a retrospective effect.'"

And, as was said by this Court, speaking through Mr. Justice Story, in *Wilkinson v. Leland*, 2 Peters 627, at 657:

> "In a government professing to regard the great rights of personal liberty and property and which is required to legislate in subordination to the general laws of England, it would not lightly be presumed, that the great principles of Magna Charta were to be disregarded, or that the estates of its subjects were liable to be taken away, without trial, without notice, and without offense. * * * That government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. * * * In *Terrett v. Taylor*, 9 Cranch 43, it was held by this court, that a grant or title to lands, once made by the legislature, to any person or corporation, is irrevocable, and cannot be re-assumed by any subsequent legislative act; and that a different doctrine is utterly inconsistent with the great and fundamental principle of a republican government, and with the right of the citizens to the free enjoyment of their property lawfully acquired. We know of no case, in which a legislative Act to transfer the property of A to B, without his consent, has ever been held a constitutional

exercise of legislative power, in any state in the Union. On the contrary, it has been constantly resisted, as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced."

See also:

Dartmouth College v. Woodward, 4 Wheat. 518.

Society v. New Haven, 8 Wheat. 464.

The Act of June 24, 1912, if given a retrospective operation, would confer upon acts and omissions occurring in the past a legal effect which they did not have at the time they occurred, and, by virtue of such retrospective operation, would transfer titles now vested in the Union Pacific Railroad Company to others not now invested. Acts and omissions occurring in the past—and which the Union Pacific and its predecessors, as the law then stood, were under no obligation to prevent or avoid, but could safely ignore—by the retrospective operation of the new statute would be given a different legal effect of such immediate potency that the railroad company would be at once deprived of its property.

Similar attempts by statute to accomplish similar results by like methods have been universally condemned. As was said in an early case by the Supreme Court of Maine, such a statute is unconstitutional and cannot be carried into effect because it—

> "would impair and destroy vested rights, and deprive the owners of real estate of their titles thereto, by changing the principles and the nature of those facts by means of which those titles had existed and been preserved to them in safety."

Proprietors v. Laboree, 2 Greenleaf (Me.) 275, 295.

The foregoing case was approved and a similar ruling made by the Supreme Court of the United States in *Webster v. Cooper*, 14 How. 488, 502, 503.

Speaking of an attempt to change a statute relating to adverse possession, and to give such change a retroactive effect, it was held in an early case that—

> "It is clearly not within the scope of the legislative power, to give to a law the effect of taking from one man his property and giving it to another, by any new rule of tenure, retroactive in its character. Therefore, the legislature could not say, by a retroactive Act, that the mere possession of a *lost feasor*, without actual enclosures, could divest the real owner of his title, and the reason is, that the law having been different, the real owner relied upon it as his protection, and took no steps, as he might otherwise have done, to defeat a result which could not have been foreseen under the law, as it stood previous to the new rule. If a party should permit another to occupy his land by enclosures, under an adverse claim, for more than twenty years, his title is gone. This results, because the law announces, that every man holds his land subject to have his title defeated in the manner indicated, and if he does not guard against such a contingency it is his own fault. On the other hand, the law has been, previous to the Act of 1852, that occupation of land by a wrongdoer, without enclosure, would have no effect upon the title of the real owner, and hence the law imposed upon the latter no obligation to defeat such wrongful possession in order to protect his rights, as it did in the case of possession accompanied by enclosures. Hence, as we have said, it was not in the power of the legislature to change this rule of law, so far as to give it a retrospective operation, because it would virtually

be taking the land of one man, held by a good legal title, and giving it to another, who the law has said had none. *Thistle v. Frostburg*, 10 Md. 129, 144-145.

Such manifestly unjust and improper legislative measures have seldom been attempted. Every such attempt has promptly been rebuked by the courts.

The courts universally condemn enactments in the nature of limitation statutes or statutes relative to adverse possession, which, by retrospective operation, purport to bar existing rights of action not barred by the prior existing law, or to create titles by previous adverse possession not created by the prior existing law.

Of such a statute the Supreme Court, in *Wilson v. Isemenger*, 185 U. S. 55, at 62, says that:

> "It would not be a statute of limitation, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions."

And in *Price v. Hopkins*, 13 Mich. 318, 324, Judge Cooley says of such a statute, that it—

> "cannot possibly be sustained as a law of limitation, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law."

And this eminent jurist uses the same language in reference to this subject in his work on Constitutional Limitations (7th Ed.) page 523.

In the very recent decision of *Ochoa v. Hernandez y Morales*, 230 U. S. 139, 161, the Court speaking through Mr. Justice Pitney, has this to say respecting a very similar situation:

"Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that Charter (2 Coke, Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing.

"Now, the effect and operation of the retroactive clause in the judicial order of April 4, 1899, as applied to the facts of the concrete case, were such that, although Morales had until then no right, title, or interest in the land in question, and had merely established through fraudulent means and without notice to the persons concerned a footing of possession, as a result of which, if they should permit his claims to remain unchallenged, and he should in fact maintain continuous possession for nearly twelve years longer, he would thereby be enabled to procure, by *ex parte* proceedings, an apparent title in himself as against them, yet the order permitted him at once, and without notice to the owners, to procure such record of ownership in his name, although they were then infants, and, so far as appears, not cognizant of his possession of the land or of any of his proceedings; and then, by virtue of other provisions of the mortgage law, he could completely deprive them of their property if he could make sale of it to a *bona fide* purchaser without notice of the infirmity of his apparent title.

"With reference to statutes of limitations, it is well settled that they may be modified by shortening the time

prescribed, but only if this be done while the time is still running, and so that a reasonable time still remains for the commencement of an action before the bar takes effect. *Terry v. Anderson*, 95 U. S. 628, 632, 24 L. ed. 365, 366; *Re Brown*, 135 U. S. 662, 701, 705, 34 L. ed. 304, 316, 317, 10 Sup. Ct. Rep. 972; *Wheeler v. Jackson*, 137 U. S. 245, 255, 34 L. ed. 659, 663, 11 Sup. Ct. Rep. 76; *Turner v. New York*, 168 U. S. 90, 94, 42 L. ed. 392, 393, 18 Sup. Ct. Rep. 38; *Wilson v. Iseminger*, 185 U. S. 55, 63, 46 L. ed. 804, 807, 22 Sup. Ct. Rep. 573. Many other cases might be cited. The question of what, under given circumstances, is to be deemed a reasonable time to be allowed for the bringing of an action when a change is made in a statute of limitations has sometimes given rise to discussion. In the present case there is no such embarrassment, for here no time whatever was allowed with respect to the case of these appellees and all others against whose lawful ownership an unlawful possession had been held for more than six years but less than twenty years at the time of the making of the judicial order.

"Since the proceeding for converting the entry of possession into a dominio title, as well as the proceeding for an entry of possession itself, was taken without notice to the owners, the effect of the judicial order was precisely the same as if the military governor had declared that the property in question should be taken from the lawful owner and given to the fraudulent occupant. Certainly General Henry can have had no such purpose, and must have been wrongly advised with respect to the results that would flow from making the order retroactive. Otherwise he would have confined it to cases where there still remained a reasonable opportunity for the real owner to contest the pretensions of the possessor. And in view

of the instructions under which he derived his authority, the judicial order must be construed as if expressly thus limited."

A further citation of authorities upon a proposition so universally conceded and upheld is quite unnecessary. We think it admits of no doubt that if the language of the Act of June 24, 1912, be such as to demand that it be construed retrospectively, necessarily in its application to the facts disclosed by these records the Act comes into collision with the express provisions of the fundamental law, and must be declared inoperative.

EIGHTH POINT.

Neither the Northern Pacific Act of April 28, 1904, (33 Stat. 538, C. 1782) nor Northern Pacific vs. Ely, 197 U. S. 1, construing and applying the same, furnishes any precedent for the decision of these cases.

The Act relating to the right of way of Northern Pacific mentioned above and entitled "An Act validating certain conveyances of the Northern Pacific Railroad Company and the Northern Pacific Railway Company," is quoted in full in 197 U. S. page 6. Said Act of Congress and the opinion of this Court in *Northern Pacific v. Ely, supra,* construing and applying the same, were strongly relied upon by counsel for defendants in error in the court below, and doubtless will be earnestly put forward in this Court as furnishing a controlling precedent. It is obvious, we submit, that said Act of Congress is readily distinguishable from that here under consideration, and it is further obvious, as it seems to us, that except for said points of distinction, the Act in question

could not have been given the construction and effect attributed to it by this Court in the Ely case. Said Northern Pacific Act reserved to the Railroad Company in any event a right of way 200 feet in width. The Union Pacific Act now under consideration limits the right of way of that railroad company to a width of one hundred feet, thus taking from the Railroad Company three-quarters of that which was originally granted.

Section 2 of the Northern Pacific Act provided that said Act "shall have no validating force until the Northern Pacific Railway Company shall file with the Secretary of the Interior an instrument in writing accepting its terms and provisions," and as stated in 197 U. S., page 6, "the terms and provisions of the Act were accepted by the Railway Company June 22, 1904, and the acceptance duly certified was filed in the Interior Department July 7, 1904." Indeed, it is understood that the Northern Pacific Act mentioned above was passed at the instance of the Railway Company.

The Union Pacific Act now under consideration contains no such provisions. By its terms it was to be effective without the consent and against the will of the Railroad Company. Because of its exceedingly drastic provisions it was never accepted by Union Pacific Railroad Company but has always been earnestly resisted by it. Except for said provision in the Northern Pacific Act and said acceptance and consent on the part of Northern Pacific Company, it would have been impossible, we respectfully submit, for this Court to give to the Act the construction and application attributed to it in *Northern Pacific v. Ely, supra.* It is obvious that Congress with the consent and by the agreement of the owner may by

legislative act deprive the owner of his property, although it be done without due process of law. It is equally obvious, we think, that without such consent Congress possesses no such power. It is obvious that with the express consent of the successor to the original grantee Congress may change the terms of the compact pursuant to which the original grant was made and the thing granted is held. It is equally obvious, we think, that without such consent no such change can be made. It is obvious that the present owner of the property may, with the consent of Congress, relinquish part of that which it and its predecessor had earned and received under the contract with the United States. It is equally obvious, we think, that without such consent Congress may not retake for the United States or vest in another title to any of said property so earned and held. The point has been expressly decided by this court in regard to the very same acts of Congress here under consideration, and emphasis laid upon the controlling importance of the consent of the grantee or the lack thereof. The United States "cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. * * * No change can be made in the title created by the grant of the lands or in the contract for the subsidy bonds without the consent of the corporation. All this is indisputable."

Sinking Fund Cases, 99 U. S. 700, 719.

Congress could not under the reserved power to alter or amend "by such alteration or amendment destroy rights actually vested, nor disturb transactions fully consummated,"

nor "take way property already acquired under the operation of the charter."

U. S. v. Union Pacific, 160 U. S. 1, 33.

Not only was the Northern Pacific Act passed with the consent of and thereafter formally in writing accepted by the Railway Company, upon which consent and acceptance its effectiveness was conditioned, but the language of the Act imperatively required that it be given a retrospective and not a prospective construction. The words were "all conveyances heretofore made," which plainly and necessarily look to the past and apply to matters occurring prior to the passage of the Act.

In the Union Pacific Act of July 24, 1912, here under consideration, like words are used with respect to conveyances and agreements. But, it is clear that Congress did not intend the operation of State statutes of limitations or adverse possession to be embraced within or covered by the words "conveyances or agreements," or governed by the same provisions. The operation of State statutes of limitation or adverse possession is separately and specifically treated in a distinct paragraph, all of the words of which look to the future and not to the past. This matter we have hereinbefore under the Sixth Point fully discussed. Evidently Congress had in mind the lack of consent on the part of the Railroad Company and its consequences, the extreme hardship and injustice (not to say unconstitutionality) which would follow if this portion of the Act were made retrospective, and so, in hope of avoiding such consequences limited the Act to a prospective operation in so far as it related to matters of adverse possession under said statutes. Under such circum-

stances, a well-settled and universally accepted canon of construction forbids us to apply the words "heretofore made," used in the first portion of the Act in respect to conveyances and agreements, to the second portion of the Act wherein adverse possession under State statute is separately and specifically dealt with.

> "It is an old and familiar rule that 'where there is in the same statute a particular enactment and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.' * * * This rule applies wherever an act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include."
>
> *United States v. Chase*, 135 U. S. 255, 260.
> *Kepner v. United States*, 195 U. S. 100, 125.
> *Townsend v. Little*, 109 U. S. 504, 512.
> Endlich on Interpretation of Statutes, sec. 399, pp. 559-560.

CONCLUSION.

We submit:

1. That independently of the Act of June 24th, 1912, title to the property in controversy, being a portion of the right of way granted by Congress, could not have been acquired by adverse possession.

2. That the portion of the right of way in controversy does

not come within the terms of the Act of June 24, 1912, but is expressly excluded from the operation thereof.

3. Should the Court conclude that the property in controversy is subject to the Act, the defendants in error are not, in these particular cases, entitled to the benefit of the Act, for the reason that its operation is prospective only, and all the transactions involved herein occurred long before the passage of the Act.

4. If construed as retroactive, the Act operates immediately and by virtue of itself alone, to take from the plaintiff in error its vested right and title to the property in controversy and transfer the same to the defendants in error without due process of law, and is, therefore, unconstitutional and beyond the power of Congress to enact.

5. That in each of the cases here in issue the judgment and decision of the Supreme Court of the State of Colorado should be reversed, and an entry of judgment in favor of Union Pacific Railroad Company should be directed.

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N. H. Loomis,
of Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 682.

UNION PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

v.

GEORGE A. SNOW AND ROBERT W. BURTON, SAID BURTON DOING BUSINESS AS AN INDIVIDUAL UNDER THE NAME AND STYLE OF THE BYERS MERCANTILE COMPANY, DEFENDANTS IN ERROR.

No. 683.

UNION PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR

v.

MARTIN V. SIDES AND WALTER W. SCHERRER, DEFENDANTS IN ERROR.

In Error to the Supreme Court of the State of Colorado.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT.

The statement exhibited in the brief of plaintiff in error, in so far as it is confined to matters of fact, is fair and accurate. The plaintiff in error,

however, in order fully to present the controversy, has, almost of necessity, interwoven into its statement of facts certain conclusions of law which the defendants in error must controvert. Inasmuch as the objectionable portions of the statement are matters of law, they are of course subjects for argument rather than statement. Under subdivision 3 of Rule 21 of this court, we hesitate, however, to allow the assertions in question to pass uncontroverted, lest our acquiescence in them be assumed.

(a) The statement of plaintiff in error lays considerable stress upon the fact that the trial court found and held, and the State Supreme Court affirmed, that by the *act of Congress of July 2, 1864*, there was granted for the railroad line in question a strip of land for right of way 400 feet in width. (Brief, pp. 6, 7, 8.) It will be shown later on in this brief that the right of way claimed by the Railroad Company has been expressly held by this court to have emanated from the *act of July 1, 1862*, as amended by the act of July 2, 1864, and not from the act of July 2, 1864. This is a material consideration in the light of the contention made by the Railroad Company that the act of Congress of June 24, 1912, by its express terms has no application to any grant of right of way derived from the act of July 2, 1864. Accordingly, it cannot be assumed, as a matter of fact, that the right of way involved was granted by the act of July 2, 1864.

(b) Plaintiff in error also asserts and reasserts that the effect of the decisions of both the *nisi prius* and supreme courts of the State of Colorado was judicially to determine that prior to the act of Con-

gress of June 24, 1912, a "*perfect title and the right of immediate possession*" to the right of way in question 400 feet in width was vested in the Railroad Company and its predecessors. (Brief, p. 8.) It is true the state courts held that prior to the act of June 24, 1912, the defense of adverse possession set up in the answers was of no avail, because the right of way in controversy had been granted to the Railroad Company as a limited fee conditioned upon its continued use for railroad purposes, and that the reversionary interest of the United States could not be acquired or divested under any adverse-possession statute of the state. Prior to the passage of the act of Congress of June 24, 1912, the defendants in error doubtless had no basis for any claim to title as against the United States because of adverse possession. Even if they had conclusively shown the abandonment of that portion of the right of way in controversy, and an undisputed right in the United States to declare a forfeiture and resume possession thereof, such a showing would have had no relevancy whatever in making out any title in them. At best it could have had no greater efficacy than to demonstrate that the United States of America, and not the defendants in error, had a valid claim to the land in controversy. The judgments of the state courts, however, and the opinion of the state Supreme Court, fairly construed, are not susceptible of the interpretation given to them in this regard by plaintiff in error. The state Supreme Court in its opinion said that prior to the act of Congress of June 24, 1912, "an individual could not acquire title to any portion of the 400 foot right of way by the statute of limitations or adverse possession,

and that the judgment of the lower court on this issue was correct." (Printed Record, p. 29.)

Under the pleadings in the state court there was no issue as to the title to the premises in controversy between the Railroad Company and the United States of America. Consequently, the courts could not, nor did they attempt to, hold more than that the *defendants in error* prior to the act of June 24, 1912, could acquire no title by adverse possession. The forfeiture or reversion of the land to the United States because of abandonment or non-user was in no wise involved or litigated. The assertion, therefore, that the state courts held the title of the Railroad Company to be *perfect* is too broad.

Supplementing the statement made in behalf of the Railroad Company, we desire to make it clear that the records in these cases present a single question for the determination of this court. The second defense in the answers sets up a title in the defendants in error by adverse possession under the statutes of the State of Colorado. The Railroad Company demurred to that defense in the lower state court, and the cases were carried to the state Supreme Court to review the ruling in favor of the Railroad Company upon the demurrer. The state Supreme Court found and held that the allegations of the second defense were in all respects sufficient under the statutes of the State of Colorado to make out a perfect title by adverse possession, and that the act of Congress of June 24, 1912, was consequently applicable. The act of Congress of June 24, 1912, by its express terms applies to all parties claiming title to any portion of the right of way in question "by or through adverse

possession of the character and duration prescribed by the laws of the state in which the land is situated." The state Supreme Court, in holding the act applicable to these cases, must of necessity, therefore, have determined that the allegations of the second defense of the answers were sufficient under the state laws to show a claim of title by adverse possession in the defendants in error "of the character and duration prescribed by the laws of the State of Colorado." The decision of the state Supreme Court in adjudging the allegations of the second defense sufficient under the state statutes will, under the well-settled rule, be deemed conclusive in this court. The only question left for determination is whether the act of Congress of June 24, 1912, has any application to the rights of the parties to these suits, and, if so, its effect when properly applied.

ARGUMENT.

I.

ANY TITLE WHICH PLAINTIFF IN ERROR OR ITS PREDECESSORS EVER HAD IN OR TO THE PREMISES IN CONTROVERSY EMANATED FROM THE ACT OF CONGRESS OF JULY 1, 1862, AND WAS A LIMITED OR DETERMINABLE FEE CONDITIONED UPON THE CONTINUED USE OF SAID RIGHT OF WAY FOR RAILROAD PURPOSES.

Stuart v. Union Pacific R. R. Co., 227 U. S., 342.

M. K. & T. R. Co. v. Kan. P. R. Co., 97 U. S., 491, 494.

U. S. v. Kan. P. R. Co., 99 U. S., 455.

Northern Pac. Ry. Co. v. Smith, 171 U. S., 260.

Northern Pac. Ry. Co. v. Townsend, 190 U. S., 267, 271.

Northern Pac. Ry. Co. v. Ely, 197 U. S., 1.

Oregon Short Line Ry. Co. v. Quigley, 10 Idaho, 770; 80 Pac., 401, 405.

First Universalist Society v. Boland, 155 Mass., 171, 174.

Greenleaf's Cruise on Real Property, Tit. 13, C. 2, sec. 64.

2 Blackstone, 155.

Kent's Commentaries (13th Ed.), Vol. 4, p. 134.

D. & S. F. Ry. Co. v. School District, 14 Colo., 327, 332.

Atlantic & Pacific R. Co. v. Mingus, 165 U. S., 413, 430.
Schulenberg v. Harriman, 21 Wall., 44.

It is now too well settled by the decisions of this court to justify any elaboration that the grants of right of way contained in the Pacific Railroad acts vested in the grantees limited or determinable fees. In effect Congress granted to the Pacific Railroad Companies the rights of way in question, to have and to hold the same so long as they were used for railroad right of way, and no longer.

In the case of *Northern Pacific Ry. Co. v. Townsend*, 190 U. S., 267, 271, the present Chief Justice succintly stated the rule as follows:

> "Manifestly the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose,—one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for railroad right of way. In effect, the grant was of a limited fee, made on an implied condition of reverter in the event that the company

ceased to use or retain the land for the purpose for which it was granted."

The act construed in the Townsend case was the act of July 2, 1864, granting a right of way to the Northern Pacific Railway Company. The grant involved in the present cases was contained in the act of Congress of July 1, 1862, and was made applicable to that portion of the line here in controversy by the amendatory act of July 2, 1864. The language used in making the grant of right of way to the Northern Pacific Railway Company was in all substantial particulars, however, precisely the same as that used in making the grant of right of way involved in these cases, and the rule laid down in the Townsend case as to the character of the title acquired by the railroad company is equally applicable to the title acquired by the plaintiff in error. We do not understand that this proposition is disputed.

Stuart v. Union Pacific R. R. Co., 227 U. S., 342.

It is to be observed that this court in the Townsend case designated the title acquired by the railroad company as a "*limited fee.*" It was a grant upon limitation, and, as this court said, was precisely the same as if Congress had expressly limited the fee granted by an habendum clause of *to have and to hold so long as it was used for railroad right of way.* An accurate conception of the precise character of the estate vested in the Railroad Company is essential to a proper determination of these cases. The title vested in the Railroad Company by the acts of Congress was

not an *estate upon condition;* it was a grant upon *limitation*, or, as the learned Chief Justice expressed it in the Townsend case, a *limited fee*. There is a material distinction between a grant upon condition and a grant upon limitation. In the case of a conditional fee, upon breach of the condition subsequent, the grantor or his successor at common law was required to make entry or its equivalent in order to work a forfeiture. A fee upon limitation, however, terminates *ipso facto*, without the necessity of any act upon the part of the grantor, upon the expiration of the time limited. Conditions attached to grants are usually introduced by the word "if" or "provided," while limitations are usually expressed by a phrase commencing with the words "so long as," "until," or "during." The grants of right of way contained in the Pacific Railroad acts, as ruled in the Townsend case, were of precisely the same effect as if Congress had in express terms limited the grant to *so long as* the right of way was used for railroad purposes, or *during* its use for railroad purposes. Immediately upon the cessation of its use for railroad purposes, the right of way, *ipso facto*, reverted to the United States. No re-entry or equivalent act was required upon the part of the federal government to make the forfeiture or reversion effective.

The distinction between estates upon condition and those upon limitation is well stated in Greenleaf's edition of *Cruise on Real Property*, Title 13, Chapter 2, section 64, as follows:

> "A *condition* is something inserted for the benefit of the grantor giving him the power on default of performance to destroy

> the estate if he will and re-vest the estate in himself or his heirs. As the law does not presume forfeiture, it requires some express act of the grantor as evidence of his intent to re-claim the estate, viz., an entry.
>
> A *limitation* is conclusive of the time of continuance and of the extent of the estate granted and beyond which it is declared in its creation not to be intended or continued. Conditions render the estate voidable by entry, limitations render it void without entry."

A condition, as stated by Blackstone, can usually be distinguished from a limitation by its initial words. A limitation commonly commences with the words "so long as," or "while," or "during," or "until," while a condition is usually made to depend upon the word "provided," or "if."

2 Blackstone, 155.

The distinction between a condition subsequent and a limitation is well illustrated by the case of *First Universalist Society v. Boland*, 155 Mass., 171, 174. The Supreme Judicial Court of Massachusetts in that case said:

> "The grant to the plaintiff was to have and to hold, etc. 'so long as said real estate shall by said society or its assigns be devoted to the uses, interests and support of those doctrines of the Christian religion,' as specified. 'And when said real estate shall by said society or its assigns be diverted from the uses, interests, and support aforesaid to, any

other interests, uses or purposes than as aforesaid, then the title of said society or its assigns in the same shall forever cease, and be forever vested in the following named persons,' etc. These words do not grant an absolute fee, nor an estate on condition, but an estate which is to continue till the happening of a certain event, and then to cease. That event may happen at any time, or it may never happen. Because the estate may last forever, it is a fee. Because it may end on the happening of the event, it is what is usually called a determinable or qualified fee. The grant was not upon a condition subsequent, *and no re-entry would be necessary;* but by the terms of the grant the estate was to continue so long as the real estate should be devoted to the specified uses, and when it should no longer be so devoted, then the estate would cease and determine by its own limitation. Numerous illustrations of words proper to create such qualified or determinable fees are to be found in the books, one of which, as old as *Walsingham's case*, 2 Plowd. 557, is 'as long as the church of St. Paul shall stand.'" (Citing many cases.)

See also:

D. & S. F. Ry. Co. v. School District, 14 Colo., 327, 332.

The grant in the present case is precisely the same in principle as the grant construed by the Massachusetts court. There the land was granted so long as it should be used for a particular purpose,

The grant of right of way under consideration in the instant cases was also limited to endure only so long as the land was used for railroad right of way. Consequently, no re-entry was necessary to terminate the estate granted.

One of the customary examples of a fee upon *condition* used by the common-law writers is a grant of lands to a town or person, provided a schoolhouse or some other character of building is erected upon it within a certain time.

> *Kent's Commentaries* (13th Ed.), Vol. 4, p. 134.

In this court there are similar cases involving grants of rights of way to railroad companies, provided the line of railroad is built within a time designated in the act, and it has been held that a re-entry, or something equivalent thereto, is necessary in such cases in order to render a forfeiture effective. It is true this court has held that no formal re-entry is necessary, but that any act upon the part of the government, either judicial or legislative, indicative of an intent to reclaim the property, is sufficient.

> *Atlantic & Pac. R. Co. v. Mingus*, 165 U. S., 413, 430.
>
> *Schulenberg v. Harriman*, 21 Wall., 44.

The distinction, however, between a grant of right of way *provided* the railroad is built within a specified time, and a grant of right of way limited to continue only *so long as* used for railroad right of way and no longer, seems to us palpable.

It is, moreover, unquestionably true, under the authority of *Schulenberg v. Harriman*, *supra*, that

even if any declaration of forfeiture were necessary in these cases, the act of June 24, 1912, was sufficient for that purpose. Further reference will be made to that matter later on.

It is submitted, therefore, that the construction placed upon the grants of right of way contained in the Pacific Railroad acts by the Townsend case demonstrates that the title so granted to the railroad companies was a fee upon limitation, and that the estate continued *so long as*, or *while*, the railroad companies continued to use the land granted for railroad purposes, and terminated *ipso facto* by the cessation of such use. Consequently, under the well-settled rule of law with respect to limitations, no act upon the part of the United States was necessary to work a forfeiture, or to reinvest the United States with a complete title to the land granted when the railroad company ceased to use it for railroad purposes. So much for the character and duration of the title conferred upon the plaintiff in error by the United States.

Plaintiff in error contends that its right of way across the premises in controversy was derived from the United States by the act of July 2, 1864. Its title is deraigned from the original grant made to the Leavenworth, Pawnee & Western Railroad Company. The complaint of the Railroad Company itself (Printed Record, p. 3) alleges that it claims title in these cases under an Act of Congress "approved *July first, 1862*, and the subsequent Acts of Congress amendatory thereof and supplemental thereto." As a matter of fact, the act of July 2, 1864, contained no grant of any right of way whatever. In the case

of *Stuart v. Union Pacific R. R. Co.*, 227 U. S., 342, decided at the October term, 1912, this court held that the act of July 2, 1864, as an amendment to the act of July 1, 1862, was to be read into the latter act, and that any grants of right of way made in the act of July 1, 1862, were to be extended in accordance with the provisions of the amendatory act of July 2, 1864. The right of way involved in the Stuart case is precisely the same as the right of way here in controversy. In fact, the premises claimed by the defendants in error are situated only a few miles distant from the property involved in the Stuart case. It was the contention of the defendants in error in the state courts that the only congressional authority for extending the line of road now owned and operated by plaintiff in error west of the one-hundredth meridian was contained in the act of July 2, 1864, and that that act contained no grant of any right of way. In the state courts plaintiff in error contended—and, indeed, its complaint so alleges—that the right of way claimed by it was derived from the act of July 1, 1862. Its contention in this respect was sustained by this court in the Stuart case. The Railroad Company now maintains that its right of way was not derived from the act of July 1, 1862, but solely from the act of July 2, 1864, and seeks thereby to avoid the effect of the act of June 24, 1912, which in express terms refers only to rights of way granted by the act of July 1, 1862. Any such contention seems to us now foreclosed by the decision of this court in the case of *Stuart v. Union Pacific R. R. Co., supra*, and by the cases of *M. K. & T. R. Co. v. Kan. P. R. Co.*, 97 U. S.,

491, 494, and *U. S. v. Kan. P. R. Co.*, 99 U. S., 455, cited and relied upon by this court in the Stuart case.

We shall proceed, therefore, upon the premise that the right of way 100 feet in width claimed by plaintiff in error and involved in the instant cases was granted to the predecessors of the plaintiff in error by the act of July 1, 1862, and that the estate granted was a limited fee, to continue only so long as the right of way was used for railroad purposes.

II.

UNDER THE ALLEGATIONS CONTAINED IN THE SECOND DEFENSE OF THE ANSWERS, THE TITLE OR OWNERSHIP OF THE LAND IN CONTROVERSY WAS CLAIMED BY OR THROUGH ADVERSE POSSESSION OF THE CHARACTER AND DURATION PRESCRIBED BY THE LAWS OF THE STATE OF COLORADO, AND THE SUPREME COURT OF COLORADO IN THESE CASES CONCLUSIVELY HELD THAT THE ALLEGATIONS OF SAID SECOND DEFENSE WERE SUFFICIENT UNDER THE STATE STATUTES TO ESTABLISH TITLE BY ADVERSE POSSESSION.

Snow v. Union Pacific R. R. Co., 133 Pac., 1037 (Printed Record, p. 27).

Sides v. Union Pacific R. R. Co., 133 Pac., 1040 (Printed Record, p. 27).

Lantz v. Newkirk, 39 Colo., 78.

Hurd v. McLellan, 1 Colo. App., 327, 330.

Latta v. Clifford, 47 Fed., 614, 619.

Elder v. McClaskey, 70 Fed., 529.

Scott v. Mineral Development Co., 130 Fed., 497; S. C., certiorari denied, 196 U. S., 640.

Harcading v. Reformed Dutch Church, 16 Pet., 455.

Santee River Cypress Lumber Co. v. Jones, 60 Fed., 360.

United States v. One Lot of Land, 178 Fed., 334.

Green v. Neal, 6 Pet., 291.

The second defense of the answers of defendants in error, to which the demurrer of plaintiff in error was sustained by the lower state court, sets up a claim of title under the adverse-possession statutes of the State of Colorado. The defense in substance alleges (Printed Record, pp. 8 and 9):

1. That neither the plaintiff nor any of its predecessors has ever at any time been in possession or occupation of any portion of the property in controversy, nor has the plaintiff nor any of its predecessors ever used or occupied the same, or any portion thereof, for railroad or other purposes.

2. That the plaintiff does not now, nor has it or any of its predecessors ever at any time in the past, needed or required said parcel of land, or any portion thereof, for railroad purposes.

3. That the defendants acquired their title to said land under and by virtue of a patent from the United States of America which issued on November

5, 1878, and various mesne conveyances thereafter duly executed.

4. That ever since the execution of said patent the defendants and their predecessors, under color of said patent, have been in open, notorious, continuous, peaceable, undisturbed, and undisputed adverse possion of all of the property in the complaint described during all of the period of time that has elapsed since the date of the issuance of said patent on November 5, 1878.

5. That during all of said period, from the issuance of said patent to the present time, the defendants and their predecessors have paid and caused to be paid all taxes which have been assessed against said property.

These cases were taken to the Supreme Court to review the ruling of the lower court in sustaining the Railroad Company's demurrer to this defense. By stipulation of counsel, the third defense and counterclaim contained in each of the answers were withdrawn from the consideration of the state Supreme Court and are not before this court. Every allegation contained in the second defense was admitted by the demurrer. In effect, these cases are now to be considered as if upon an agreed statement of facts consisting of the allegations contained in the second defense of the answers.

The Colorado statutes with respect to the acquisition of title by adverse possession are as follows:

> "That no person shall commence an action for the recovery of lands, or make an entry thereon, unless within twenty years

after the right to bring such action or make such entry first accrued, or within twenty years after he or those from, by or under whom he claims, have been seized or possessed of the premises, except as hereinafter provided."

Sec. 4084, R. S. Colo., 1908 (Session Laws of Colo., 1893, p. 327, sec. 1).

"Every person in the actual possession of lands or tenements, under claim and color of title, made in good faith, and who shall, for seven successive years, continue in such possession, and shall also, during said time, pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession, and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section."

Sec. 4089, R. S. Colo., 1908 (Session Laws of Colo., 1893, p. 328, sec. 6).

The sections above quoted are supplemented by sections 4085, 4086, 4087, and 4088, Revised Statutes of Colorado, 1908.

It is to be observed that the allegations contained in the second defense of the answers show title in the defendants in error both under the twenty-year statute of limitations and the seven-year statute. It is not necessary, however, in this court to demonstrate the sufficiency of the answers to show title by adverse possession under the Colorado statutes. The judgments entered by the Supreme Court of Colorado are conclusive of that question. The state Supreme Court, in entering judgments in favor of the defendants in error, necessarily considered and determined that the defendants, by the allegations of the second defense, had shown good title under the adverse-possession statutes of the state. On no other conceivable theory could the state Supreme Court have held the act of Congress of June 24, 1912, applicable. That act by its express terms applies only to three classes of persons: *first*, those having agreements with or conveyances from the Railroad Company; *second*, those claiming title as against the Railroad Company by or through adverse possession of the character and duration prescribed by the state statutes; and, *third*, owners of land abutting on portions of the right of way which had been abandoned.

No claim has ever been made in these cases under any agreement with or conveyance from the Railroad Company. If there was any *abandonment* of the premises in controversy by the Railroad Company, it was because the intention to abandon would necessarily inhere in the implication of a grant arising out of the adverse possession of the defendants in error of the

character and duration prescribed by the state laws. The second defense does not expressly allege an abandonment, although, if title by adverse possession be established, a conclusive presumption of a grant will arise, and a grant from the Railroad Company would necessarily involve an abandonment. Whether the premises in controversy, therefore, under the allegations of the second defense, can be said to have been abandoned depends entirely upon whether the allegations of that defense are sufficient to show title by adverse possession under the state statutes. Consequently, the state Supreme Court, in affirming the title of the defendants in error under the act of Congress of June 24, 1912, could not have applied the provisions of the last-mentioned act unless it had first found and determined that the defendants had established a good title by adverse possession under the Colorado statutes. If the state Supreme Court had been of the opinion that the allegations contained in the second defense of the answers were not sufficient to show title by adverse possession of the character and duration prescribed by the laws of the State of Colorado, there would have been no basis or occasion for invoking the act of Congress of June 24, 1912, and upon no conceivable theory could that act have had any application.

It is, of course, well settled that the construction placed by the highest court of the state upon its adverse-possession statutes will be accepted as controlling by the national courts.

In *Green v. Neal*, 6 Pet., 291, this court followed the decisions of a state court with respect to its adverse-possession statutes, although there had been a

prior decision in this court to the contrary construing the same statute.

Elder v. McClaskey, 70 Fed., 529.

Scott v. Mineral Development Co., 130 Fed., 497; certiorari denied in 196 U. S., 640.

Harending v. Reformed Dutch Church, 16 Pet., 455.

Santee River Cypress Lumber Co. v. Jones, 60 Fed., 360.

United States v. One Lot of Land, 178 Fed., 334.

THE TITLE ACQUIRED BY THE DEFENDANTS IN ERROR UNDER THE ADVERSE-POSSESSION STATUTES OF COLORADO WAS PRECISELY EQUIVALENT IN CONTEMPLATION OF LAW TO SUCH TITLE AS THEY WOULD HAVE ACQUIRED HAD THE RAILROAD COMPANY EXPRESSLY GRANTED TO THEM ALL ITS RIGHT, TITLE, AND INTEREST IN THE PREMISES IN CONTROVERSY.

Northern Pacific Ry. Co. v. Ely, 197 U. S., 1.

Sharon v. Tucker, 144 U. S., 533, 543.

Toltec Ranch Co. v. Cook, 191 U. S., 532, 538.

3 Washburn on Real Property (5th Ed.), p. 176.

It is now settled that adverse-possession statutes do not merely bar the remedy, but operate as an actual transfer of title. Adverse possession for the statutory period raises a conclusive presumption of a grant, and is quite as effectual a conveyance of title as if an express grant had been originally made.

This proposition is discussed and settled in the case of *Northern Pacific Ry. Co. v. Ely*, 197 U. S., 1, 7. In that case a confirmatory act similar to the act of June 24, 1912, was passed with respect to conveyances made by the Northern Pacific Railway Company of parts of its right of way. The Northern Pacific act did not in express terms confirm the title acquired to portions of the right of way by adverse possession. This court, however, in the Ely case held that title acquired by adverse possession rested in grant quite as much as if an express conveyance had been made. The grant arising by necessary implication from the adverse possession was held to be in all respects equivalent to, and of the same force and effect as, an express conveyance. Accordingly, the act of Congress construed in the Ely case, although it applied expressly only to *conveyances*, was held by this court to be equally applicable to implied conveyances arising out of adverse possession.

In the case of *Toltec Ranch Company v. Cook*, 191 U. S., 532, 538, this court said:

> "Adverse possession, therefore, may be said to transfer the title as effectually as a conveyance from the owner; it may be considered as tantamount to a conveyance."

In *Sharon v. Tucker*, 144 U. S., 533, 543, Mr. Justice Field, speaking for this court, said:

> "It is well settled that by adverse possession for the period designated by the statute, not only is the remedy of the former owner gone, but his title has passed to the occupant, so that the latter may maintain ejectment for possession against such former owner should he intrude upon the premises. In several of the states this doctrine has become a positive rule, by their statutes of limitations declaring that uninterrupted possession for the period designated to bar an action for the recovery of land shall of itself constitute a complete title."

It is said by Mr. Washburn, in his work on Real Property (5th Ed., Vol. 3, p. 176):

> "The operation of the statute (adverse-possession statute) takes away the title of the real owner and transfers it not in form indeed, but in legal effect, to the adverse occupant. In other words, the statute of limitations gives a perfect title. The doctrine is stated thus strongly because it seems to be the result of modern decisions, although it was once held that the effect of the statutes was merely to take away the remedy and did not bind the estate or transfer the title."

The Colorado statute with respect to the acquisition of title by possession of lands under claim and

color of title made in good faith, and the payment of taxes thereon for seven successive years (sec. 4089, R. S. Colo., 1908), provides that the person so claiming adversely "shall be held and adjudged to be the legal owner of said lands or tenements to the extent and according to the purport of his or her paper title." There can be no question about the sufficiency of the allegations of the second defense to show title in the defendants in error under the adverse-possession statutes of the state. Indeed, we do not understand that plaintiff in error disputes this proposition. Moreover, the decision of the state Supreme Court in these cases, as we have already shown, is conclusive in that regard. The adverse-possession statute is not ambiguous, and its plain terms are satisfied by the allegations of the second defense. The defendants in error and their predecessors claim title under color of a patent issued by the United States to their predecessor on November 5, 1878. That patent embraced the particular property in controversy, and there was no exception or reservation of any kind or character whatsoever contained in it with respect to railroad right of way. The allegations are direct and unequivocal with respect to the possession and payment of taxes for more than seven successive years. The defense is equally clear and specific in showing a compliance with the twenty-year statute. (Sec. 4084, R. S. Colo., 1908.)

In the Stuart case, *supra*, this court declined to pass upon the effect of the act of June 24, 1912, because, so far as the record in that case disclosed, the railroad company had paid the taxes upon the land in controversy quite as much as the parties claiming

by adverse possession. In these cases, however, there is no room for any such contention. The second defense of the answers alleges, and the demurrer admits, that the defendants in error have paid *all* the taxes assessed against the premises in dispute for a much longer period than that required by the statute of limitations. If the act of June 24, 1912, coupled with the adverse-possession statutes of the State of Colorado, is capable of vesting any title in claimants to portions of the right of way in controversy, these cases present the issue in a clear-cut and unequivocal manner.

We submit, therefore, that in legal contemplation the right acquired by the defendants in error under the adverse-possession statutes of the state was and is precisely equivalent to an express grant to them by the Railroad Company of all its right, title, and interest in the premises in controversy.

This court in the Ely case, *supra*, went so far as to say that the statute under consideration in that case, which in terms applied only to *conveyances*, was equally applicable to title acquired by adverse possession, because such possession carries with it by necessary and inevitable implication the conclusive presumption that a prior express conveyance had been made.

IV.

THE IMPLICATION OF A GRANT FROM THE RAILROAD COMPANY ARISING OUT OF THE ADVERSE POSSESSION OF THE DEFENDANTS IN ERROR IS CONCLUSIVE EVIDENCE OF A VOLUNTARY ABANDONMENT ON THE PART OF THE RAILROAD COMPANY OF THE PREMISES IN QUESTION.

Stevens v. Norfolk, 42 Conn., 377.

Livermore v. White, 74 Me., 452.

Myers v. Spooner, 55 Cal., 257.

Davis v. Perley, 30 Cal., 630.

North American Co. v. Adams, 104 Fed., 404.

The defendants in error do not contend that it was incumbent upon the Railroad Company to occupy every square foot of the right of way granted to them by the act of July 1, 1862. In fact, this court has expressly ruled that no such necessity existed, and that no abandonment could be assumed merely because a portion only of the entire right of way granted had at any particular time been actually occupied.

Abandonment includes both the intention to abandon and the external act by which the intention is carried into effect.

Stevens v. Norfolk, 42 Conn., 377.

Livermore v. White, 74 Me., 452.

An abandonment in contemplation of law is not complete unless there is a concurrence of the intention to abandon and an actual relinquishment of the property, so that it may be appropriated by the next comer. Intention in such a case, however, as in all other cases, can usually only be proved by circumstantial evidence. As an attitude of mind, it is not susceptible, in the face of denial, of being positively demonstrated by direct evidence. Accordingly, whether the intention at any time existed is to be determined from all the facts and circumstances.

Myers v. Spooner, 55 Cal., 257.

Davis v. Perley, 30 Cal., 630.

North American Co. v. Adams, 104 Fed., 401.

We believe these principles so well settled as neither to require nor justify a discussion of the authorities.

It is not here contended that the defendants in error could acquire any title to the premises in controversy by abandonment alone. Our contention is that the adverse possession of the defendants in error for the period and under the circumstances prescribed by the Colorado statutes raised a conclusive presumption of a grant from the Railroad Company. The Railroad Company of course can be presumed to have granted only such right, title, and interest as it was capable of granting, and it could not divest by either an express or an implied grant the reversionary interest of the United States. If, however, the Railroad Company had made an express conveyance of all its right, title, and interest in the premises to the defend-

ants in error, it seems to us indisputable that this court would at least have been justified in assuming that the Railroad Company had by such a conveyance clearly expressed its intent to abandon the property for railroad right of way. If such had been the effect of an express grant, and if title claimed by adverse possession raises a conclusive presumption of a grant, it is submitted that such an intention upon the part of the Railroad Company can be deduced with equal justification from the implied grant. If the Railroad Company will not be heard to say that it did not make a grant of the premises in question, it certainly should not be permitted to say that it did not abandon the premises as railroad right of way.

If we are justified in concluding that the Railroad Company abandoned the land in dispute, by virtue of the limitation attached to the original grant, the land reverted *ipso facto* upon its abandonment to the United States, and the United States, by the act of Congress of June 24, 1912, has granted the abandoned property so revested in it to the defendants in error as the abutting owners and claimants by adverse possession. Even if the abandonment upon the part of the Railroad Company simply subjected the premises to forfeiture at any time at the option of the United States, the act of June 24, 1912, is an express declaration by Congress of its election to exercise that option to reclaim the property and confirm the title thereto in such persons as may establish a claim to it by or through the adverse-possession statutes of the state or as owners of the abutting land.

V.

THE ACT OF CONGRESS OF JUNE 24, 1912, WAS EQUIVALENT TO A RE-ENTRY OR DECLARATION OF FORFEITURE OR REVERTER UPON THE PART OF THE UNITED STATES OF THE LAND IN CONTROVERSY, BECAUSE OF ITS ABANDONMENT AND NON-USER AS A RAILROAD RIGHT OF WAY, AND HAD THE EFFECT OF CONFIRMING IN THE DEFENDANTS IN ERROR THE TITLE ACQUIRED BY THEM BY ADVERSE POSSESSION AND UNDER THE PATENT ISSUED BY THE UNITED STATES TO THEIR PREDECESSOR IN TITLE ON NOVEMBER 5, 1878.

Northern Pacific Ry. Co. v. Ely, 197 U. S., 1.

Atlantic & Pacific R. R. Co. v. Mingus, 165 U. S., 413, 430.

Schulenberg v. Harriman, 21 Wall., 44.

Spokane & B. C. Ry. Co. v. Washington & G. N. Ry. Co., 219 U. S., 166.

The Act of June 24, 1912, to which frequent reference has been made heretofore, is comparatively short, and for that reason we may be pardoned for setting it out here in full. The act reads as follows:

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED,

That all conveyances or agreeemnts heretofore made by the Union Pacific Railroad Company, or the Union Pacific Railway Company, or Union Pacific Railroad Company, or the Leavenworth, Pawnee and Western Railroad Company, or the Union Pacific Railway Company, Eastern Division, or the Kansas Pacific Railway Company, or the successors or assigns of any of them, of or concerning land forming a part of the right of way of the Union Pacific Railroad Company granted by the government by the act of congress of July first, eighteen hundred and sixty-two, entitled, 'An act to aid the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean and to secure to the government the use of the same for postal, military, and other purposes;' and also all conveyances or agreements heretofore made by the Union Pacific Railroad Company, or the Union Pacific Railway Company, or the Denver Pacific Railway and Telegraph Company, or the successors or assigns of any of them, of or concerning land forming a part of the right of way between Denver, Colorado, and Cheyenne, Wyoming, of any of said companies granted by or held under any act of congress, and all conveyances or agreements confining the limits of said right of way, or restricting the same, are hereby legalized, validated, and confirmed to the extent that the same would have been legal or valid if the land involved

therein had been held by the corporation making such conveyance or agreement under absolute or fee-simple title.

That in all instances in which title or ownership of any part of said right of way heretofore mentioned is claimed as against said corporation, or either of them, or the successors or assigns of any of them, by or through adverse possession of the character and duration prescribed by the laws of the state in which the land is situated, such adverse possession shall have the same effect as though the land embraced within the lines of said right of way had been granted by the United States absolutely or in fee instead of being granted as a right of way.

Sec. 2. That any part of the right of way heretofore mentioned which has been, under the law applicable to that subject, abandoned as a right of way is hereby granted to the owner of the land abutting thereon.

Sec. 3. That nothing hereinbefore contained shall have the effect to diminish said right of way to a less width than fifty feet on each side of the center of the main track of the railroad as now established and maintained; provided, that nothing herein contained shall be taken or construed to be a recognition of any right in the Union Pacific Company as successor in interest to the Union Pacific Railroad Company."

It is to be observed that Congress by the foregoing act "legalized, validated and confirmed" all prior conveyances or agreements with respect to the right of way in controversy, as well as all claims of title to any portion thereof by adverse possession or on account of abandonment. An attempt has already been made to demonstrate that the estate granted to the Railroad Company by the act of July 1, 1862, was a fee upon limitation, and that the moment the Railroad Company ceased to use the land so granted for railroad right of way, it reverted, *ipso facto*, to the grantor. No act or declaration upon the part of the United States was necessary to work a forfeiture.

However, even if it be conceded, for the purpose of the argument, that it was necessary for the United States to take some action before the forfeiture was complete, the act of June 24, 1912, was sufficient for that purpose.

In *Atlantic & Pacific R. R. Co. v. Mingus*, 165 U. S., 413, this court had under consideration the grant of right of way to a railroad company conditioned upon the completion of the road within a specified time. Unlike the grant here involved, the estate there created was upon condition and not limitation, so that some act upon the part of the United States was necessary to declare a breach of the condition and work a forfeiture. The character of federal action necessary to effect that end was one of the matters litigated, and this court expressly held that no judicial proceeding was necessary upon the part of the United States to effect a forfeiture of lands granted upon condition, but that legislative action upon the part of Congress was sufficient.

In *Schulenberg v. Harriman*, 21 Wall., 44, the manner of forfeiting a similar railroad grant conditioned upon the completion of the road within a specified time was considered. Mr. Justice Field there said:

> "In what manner the reserved right of the grantor for breach of the condition must be asserted so as to restore the estate depends upon the character of the grant. If it be a private grant, that right must be asserted by entry or its equivalent. If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, *or there must be some legislative assertion of ownership of the property for breach of the condition, such as an Act directing the possession and appropriation of the property, or that it be offered for sale or settlement.* At common law the sovereign could not make an entry in person, and, therefore, an office found was necessary to determine the estate; but, as said by this court in a late case, 'The mode of asserting or of resuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly under the authority of the government without these preliminary proceedings.' U. S. v. Repentigny, 5 Wall. 267."

The same rule was announced by this court in the recent case of *Spokane & British Columbia Ry. Co. v. Washington & Great Northern Ry. Co.*, 219 U. S., 166.

The act of June 24, 1912, seems to us a direct and unequivocal declaration upon the part of Congress of its intention to declare a forfeiture of the premises in controversy, and to vest the title thereto in the defendants in error as claimants by or through adverse possession of the character and duration prescribed by the statutes of the State of Colorado.

As tested by the rule laid down in the *Schulenberg* case, *supra*, by Mr. Justice Field, the act here under consideration is certainly equivalent to a direction that the property be reappropriated by the government, or that it be offered for sale or settlement. If Congress had offered the particular land forfeited for sale or settlement, the effect would have been in no respect different from confirming the title thereto in actual settlers who had been in possession of the premises for more than thirty years, and had made improvements thereon.

The grant to the Railroad Company was a *limited fee*, and the estate granted expired *ipso facto* when the Railroad Company ceased to use it for railroad purposes. But, even if some act of forfeiture was necessary, the act of Congress of June 24, 1912, was amply sufficient to satisfy the requirements of the law in that regard. The defendants in error claim title to the land in question by adverse possession of the character and duration prescribed by the laws of the State of Colorado. The Supreme Court of the State of Colorado in these cases, construing the state statutes, has

conclusively held the allegations of the second defense sufficient to show a good title by adverse possession. Nothing more was necessary to entitle the defendants in error to the benefits of the act of June 24, 1912. The Railroad Company, by abandonment, by the expiration of the period of limitation attached to its original grant, and by a forfeiture for non-user, no longer had any right or interest in the property. It had reverted to the United States, and by the act of June 24, 1912, the reversion, which was in itself a perfect title, was granted to the defendants in error.

VI.

A CONSIDERATION OF THE POINTS MADE BY PLAINTIFF IN ERROR, AND AN ANSWER TO EACH BRIEFLY IN TURN.

1. The defendants in error concede the jurisdiction of this court.

2. The decision in the case of *Stuart v. Union Pacific R. R. Co.*, 227 U. S., 342, did not pass upon the questions involved in these cases. In the Stuart case a claim by adverse possession was asserted under the Colorado statute requiring the payment of taxes for seven successive years. This court expressly held that from the record it was impossible to determine whether the railroad company had paid the taxes, or the occupants. No such ambiguity exists in these records, because it is alleged in the second defense of the answers that the defendants in error paid *all* the taxes upon the property claimed by them for a period of more than thirty successive years. The de-

murrer of the Railroad Company admits that allegation, and it therefore stands conceded as a fact upon the records here presented that the defendants in error have paid all the taxes assessed against the property during the period of their occupancy.

The *Stuart* case, moreover, as has been shown, did not hold that the right of way involved in these cases was granted by the act of Congress of July 2, 1864. On the contrary, it was there expressly held that the right of way was granted by the act of July 1, 1862, as amended by the act of July 2, 1864. It is true this court, in the *Stuart* case, on the record there exhibited, decided the controversy in favor of the railroad company, but without any reference whatever to the effect of the act of June 24, 1912, upon which the entire argument in these cases is based.

3. The nature and attributes of the title to the right of way vested in the Railroad Company have already been fully discussed.

4. What has already been said with respect to the act of June 24, 1912, seems to us a sufficient refutation of the contentions made by plaintiff in error under the fourth point in its brief.

5. We have already endeavored to show that the right of way involved in the instant cases emanated from the act of July 1, 1862, and not from the act of July 2, 1864, and that the act of June 24, 1912, was, therefore, directly applicable. The complaint of plaintiff in error filed in the lower state court, and set out on page 3 of the printed transcript, expressly alleges that the right of way claimed was derived from the act of July 1, 1862. Its claim in this regard was judicially affirmed by this court in the *Stuart* case. It

seems to us now too late to shift the basis of the argument, and, in order to avoid the effect of the act of June 24, 1912, to contend that the right of way claimed in the complaint itself to have been granted by the act of July 1, 1862, is deduced from the act of July 2, 1864, alone.

6. It is entirely unnecessary to give the act of June 24, 1912, any retrospective effect. The act itself operates *in praesenti* in so far as it declares a forfeiture of the portions of the right of way conveyed away, claimed by adverse possession, or abandoned, and also operates *in praesenti* in so far as it conveys the reversionary interest of the United States to the persons entitled to the benefit of the act, or confirms their pre-existing titles. The act expressly refers to cases where title or ownership "*is claimed*" by or through adverse possession. It was intended to apply to titles claimed at the time of the passage of the act by adverse possession. Such titles of necessity must have been initiated prior to the enactment of the act. For that reason, however, the act cannot properly be said to be retrospective, because the language used simply designates the classes of persons to whom confirmatory grants are made. The grants operate *in praesenti*, and Congress with equal propriety might have arbitrarily designated as the beneficiaries of the grant any classes of persons it might have seen fit to select, irrespective of whether they claimed title prior to the passage of the act or not.

7. It is conceded that the act of June 24, 1912, correctly construed, is not retrospective in its operation, but it is submitted that it is in no respect necessary to apply a retrospective construction to the act in order to make it applicable to these cases.

8. The act of June 24, 1912, whether it be given a retrospective or prospective construction, as those terms are used by counsel for plaintiff in error, cannot be said to have the effect of depriving the plaintiff in error of a vested property right without due or any process of law. It is our contention that any property right which the plaintiff in error had in and to the premises in controversy terminated *ipso facto* by non-user for railroad right of way; that the only estate ever granted was nothing more than a limited fee, and the claim of defendants in error is based upon the proposition that the period of limitation had expired, and that the title of the Railroad Company had been forfeited to the United States. Strictly speaking, the defendants in error claim no title from the Railroad Company. Their title is derived directly from the United States by the confirmatory act of June 24, 1912. If the title of the Railroad Company has not reverted or been forfeited to the United States of America, then the defendants in error have no basis for their claim. If, however, prior to the institution of these suits, or upon the passage of the act of June 24, 1912, the Railroad Company lost all title it ever had because of a breach of the limitation or condition attached to the original grant, there is no basis for any contention that property has been taken without due process of law.

9. The fact that the Northern Pacific act of April 28, 1904, construed in *Northern Pacific Ry. Co. v. Ely* 197 U. S., 1, was voluntarily accepted by the railroad company seems to us absolutely immaterial. The United States of America, in order

to make effective the limitation attached to the original grant of right of way, was not compelled to obtain the consent of the Railroad Company. If, as a matter of fact, the plaintiff in error, or any of its predecessors in title, ceased to use the right of way granted by the act of July 1, 1862, for railroad right of way, the United States of America was perfectly competent to resume possession of the portions abandoned without any necessity of obtaining the consent of the Railroad Company. Consequently, if we have succeeded in demonstrating that the portion of the right of way here in controversy had reverted to the United States prior to or because of the passage of the act of June 24, 1912, whether or not the Railroad Company consented to and accepted the provisions of that act seems to us of no consequence whatever.

The act of June 24, 1912, was passed after the judgment was entered in the lower state court, and prior to the entry of judgment by the state Supreme Court. Under the Colorado practice, the Supreme Court of the state has the power to enter a final judgment upon reversal, without remitting the case to the court below. In these cases the Supreme Court of Colorado followed that practice, and the judgments brought to this court for review were entered subsequent to the enactment of the act of June 24, 1912.

It seems now well settled that a legislative act passed subsequent to the entry of a judgment in a lower court, and while a case is pending in an ap-

pellate court on appeal or writ of error, may be considered and applied by the appellate court.

Penna. v. Wheeling & B. Bridge Co., 18 How., 421, 430.

Northern Pacific Ry. v. Ely, 197 U. S., 1.

United States v. Schooner Peggy, 1 Cranch., 103, 110.

American Sugar Co. v. New Orleans, 119 Fed., 691.

Canal Co. v. Western Md. R. R. Co., 99 Md., 570.

It is not necessary, however, to consider or determine that question in these cases, because the judgments here sought to be reviewed were final judgments entered by the state Supreme Court long after the act of June 24, 1912, had become effective. Whether the state court, in reviewing the judgment of the lower court, and in entering a final judgment, had the right to consider a statute enacted after the entry of judgment in the lower court, was purely a question of state practice, upon which the judgment of the Supreme Court of Colorado should not here be questioned. Moreover, plaintiff in error does not dispute this proposition.

CONCLUSION.

To conclude, we respectfully submit:

1. That any estate which the plaintiff in error ever had in the premises in controversy was at best

nothing more than a limited fee, and expired *ipso facto* under the very terms of the original grant the moment the Railroad Company ceased to use the land for a railroad right of way.

2. That, even if the estate granted to the Railroad Company by the act of July 1, 1862, be construed as a grant upon condition rather than upon limitation, the act of June 24, 1912, evinces a clear legislative intent to forfeit the land here in controversy because of non-user, and was sufficient to work a forfeiture and reinvest the United States with a perfect title.

3. That the defendants in error, under the allegations contained in the second defense of the answers, have shown themselves claimants by adverse possession of the character and duration prescribed by the statutes of the State of Colorado, and also as the owners of the land abutting upon an abandoned portion of the right of way, and are clearly comprehended within the classes of beneficiaries entitled to the provisions of the act of June 24, 1912.

4. That the implication of a grant arising out of the adverse possession of the defendants in error under the state statutes is precisely equivalent to a voluntary conveyance upon the part of the Railroad Company, and is, therefore, conclusive evidence of the intention of the Railroad Company to abandon the premises in controversy.

5. That the act of June 24, 1912, had the effect of a conveyance to the defendants in error, as claimants by adverse possession and the owners of property abutting upon an abandoned portion of the right of way, of a perfect title to the premises in controversy,

as well as of confirming in the defendants in error the title previously granted to them by the United States by the patent of November 5, 1878, issued to their predecessors in title.

6. That, for the reasons stated, the judgments of the Supreme Court of Colorado should be affirmed.

Respectfully submitted,

MILTON SMITH,
CHARLES R. BROCK,
W. H. FERGUSON,
Attorneys for Defendants in Error.

No. 688.

File No.....

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN RONEY, J. A. CRANE, A. P. WRIGHT, J. F. HAYDEN, JOHN DOE, JANE DOE and RICHARD ROE,

Plaintiffs in Error,

Against

H. J. VAN NESS,

Defendant in Error.

Brief and Arguments of Defendant in Error

— ON —

Motion to Dismiss Writ of Error

THEODORE A. BELL,
C. H. BRAYNARD and
C. F. KIMBALL,
Attorneys for Defendant in Error,
H. J. VAN NESS.

Filed this.....*day of October, 1913.*

....., *Clerk.*

By.....

Deputy Clerk.

INDEX

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Plaintiffs in Error,

Against

H. J. VAN NESS,

Defendant in Error.

BRIEF AND ARGUMENTS ON MOTION TO DISMISS WRIT OF ERROR.

STATEMENT OF THE CASE.

This action was brought by the defendant in error against the plaintiffs in error in the Superior Court of the State of California in and for the County of Trinity to quiet his title to a certain quartz mining claim known as the "Five Pines Mine," and judgment was rendered by said Superior Court in favor of the defendant in error. Plaintiffs in error thereupon moved for a new trial of said action and appealed from the order of said Superior Court denying their said motion for a new trial to the Supreme Court of the State of California. The

Supreme Court of California, in Department Number Two thereof, affirmed the decision of said Superior Court, whereupon plaintiffs in error herein filed their petition for a rehearing of said case in bank by said Supreme Court of the State of California. Said petition for a rehearing was denied by said Supreme Court of the State of California on the 6th day of July, 1911, and on the next day thereafter, to-wit, on the 7th day of July, 1911, the order denying said Petition for a rehearing was entered, filed and recorded in the Clerk's office of said State Supreme Court.

More than two years thereafter, to-wit, on July 22, 1913, the alleged writ of error herein was filed in the Clerk's office of said Supreme Court.

Furthermore, said alleged writ of error was granted by the Chief Justice of the Supreme Court of the State of California upon the express condition that the order granting the writ was to take effect on the approval of an undertaking in the penal sum of five hundred dollars. While this order of the Chief Justice of the State Supreme Court was made on June 19, 1911, and within the two years from the denial of the petition for a rehearing, the required bond was not approved until July 21, 1913, more than two years from the date of the denial of said petition for a rehearing in said State Supreme Court, and was not filed in the Clerk's office of said State Supreme Court until the following day, to-wit, July 22nd, 1913.

BRIEF AND ARGUMENTS.

No judgment, decree or order of a State Court in any action at law or in equity, can be reviewed by the Supreme Court of the United States, unless the writ of error is brought within two years after the entry of such judgment, decree or order.

U. S. R. S., Section 1008.
Allen vs. *So. Pac. R. Co.*, 173 U. S. 479.
Holt vs. *Indiana Mfg. Co.*, 176 U. S. 68.

In this case and for the purposes of the writ of error under consideration, the time of the plaintiffs in error commenced to run from July 7, 1911, when the denial of their petition for a rehearing in bank by the Supreme Court of the State of California which was made on the preceding day was entered and recorded and filed in the Clerk's office of said State Supreme Court. Where a petition for a rehearing is duly filed, as here, the time does not commence to run until the rehearing is denied.

Texas & Pac. Ry. Co. vs. *Murdock*, 111 U. S. 488.
Memphis vs. *Brown*, 94 U. S. 715.
Aspen M. S. S. Co. vs. *Billings*, 150 U. S. 31.
Alexander vs. *U. S.*, 57 Fed. 828.
Re McCall (C. C. A.), 145 Fed. 898.

The writ of error is not brought until it is filed in the office of the Clerk to which it is addressed, and the writ of error in the case at bar was not filed in the office of such Clerk until July 22, 1913, more than two years after the denial of said petition for a rehearing. This Court has therefore no jurisdiction to entertain said alleged writ of error and

said alleged writ of error should be quashed and dismissed.

Brooks vs. *Norris*, 11 How. 204.
Scarborough vs. *Pargaud*, 108 U. S. 567.
U. S. vs. *Baxter* (C. C. A.), 51 Fed. 624.
Kentucky C. T. O. & L. Co. vs. *Howes* (C. C. A.), 153 Fed. 163.

It has been held that where the last day of the limited time was Sunday, the writ could not be brought on a subsequent day.

Johnson vs. *Meyers* (C. C. A.), 54 Fed. 417.

The time to sue out a writ of error cannot be extended by the Court by an order allowing it to be filed "*nunc pro tunc*" or otherwise.

Credit Co. vs. *Arkansas C. Ry. Co.*, 128 U. S. 258.
Judson vs. *Courier Co.*, 25 Fed. 705.

Such time cannot be extended by consent.

Clark vs. *Doerr* (C. C. A.), 143 Fed. 960.

And it has been held that defendants in error cannot waive the objection that the time has expired.

Stevens vs. *Clark* (C. C. A.), 62 Fed. 321.

Furthermore, the writ of error under consideration was allowed by the Chief Justice of the State Court upon a condition subsequent with which the plaintiffs in error did not comply until their time to bring a writ of error herein had expired. The

required bond was not approved until July 22, 1913, and the order granting the writ of error provided: "This order is to take effect on the approval of undertaking in the penal sum of five hundred dollars."

Where the allowance of a writ of error is upon condition that the petitioner give a bond, the writ of error is not brought until the bond is filed.

Simpson vs. *First Nat. Bank* (C. C. A.), 129 Fed. 257.
Kentucky C. T. O. & L. Co. vs. *Howes* (C. C. A.), 153 Fed. 163.
Beardsley vs. *A. & L. Ry. Co.*, 158 U. S. 123.

So, where the writ of error is tested, allowed and issued within the time, but not filed until afterwards, it is brought too late.

Brooks vs. *Norris*, 11 How. 204.
Mussina vs. *Cavazos*, 6 Wall. 355, 360.
Scarborough vs. *Pargaud*, 108 U. S. 567.
U. S. vs. Baxter, 51 Fed. 624.

We submit that the writ of error herein was not brought within the time allowed by law and that the same should be quashed and dismissed.

Attorneys for Defendant in Error.

(Title of Court and Cause.)

AFFIDAVIT OF DEFENDANT IN ERROR.

United States of America,)
Northern District of California,) ss.
County of Alameda, State of California.)

H. J. Van Ness, being duly sworn, deposes and says: I reside in the City of Oakland, County of Alameda, State of California. I am the defendant in error in the above-entitled action.

On August 6th, 1907, as plaintiff, I brought suit against the above-named plaintiffs in error as defendants in the Superior Court of the State of California in and for Trinity County in said State; that the purpose of said suit was to quiet my title to a quartz mining claim known as the "Five Pines Mine," located in said Trinity County, and being in part situated in Section 29, Township 35 North, Range 7 West, Mount Diablo Meridian. Thereafter and within the time allowed by law, said plaintiffs in error answered my complaint in said action setting up title to all of said mining claim within said Section 29 as successors in interest under a patent issued by the United States of America to the Central Pacific Railroad Company on February 14th, 1896. Thereafter and on June 15th, 1908, said cause was heard on its merits in said Superior Court and judgment was thereafter and on October 5th, 1908, entered in said cause by said Superior Court in my favor and declaring me to be the owner and entitled to the possession of said "Five Pines Mine"

against every one except the Government of the United States, and that said plaintiffs in error herein had no right or title to any part thereof.

That thereafter said plaintiffs in error herein moved for a new trial, which was denied, and thereafter, within the time allowed by law, the said plaintiffs in error herein took an appeal from said order denying their motion for a new trial to the Supreme Court of the State of California.

On June 6th, 1911, said Supreme Court of the State of California, in Department Number Two thereof, after oral and written argument by the respective parties and after consideration of said last named Court in said Department, rendered its decision affirming the decision and order of said Superior Court of said Trinity County.

On June 26th, 1911, said plaintiffs in error herein filed in the Clerk's office of said State Supreme Court their petition for a rehearing in bank of said cause by said Supreme Court of the State of California, which said petition was denied by said State Supreme Court on the 6th day of July, 1911.

On July 7, 1911, the denial of said petition for a rehearing was duly filed, entered and recorded, in the Clerk's office of said Supreme Court of the State of California, and the Remittitur of said last named Court was issued to the County Clerk of said Trinity County.

On May 31, 1913, said plaintiffs in error herein

filed in the Clerk's office of said State Supreme Court their Petition for writ of error to the Supreme Court of the United States and their Assignment of Errors.

On June 19, 1913, said petition for writ of error was granted by the Chief Justice of the Supreme Court of the State of California in the following language: "The above petition for a writ of error is granted. This order is to take effect on the approval of undertaking in penal sum of five hundred dollars."

On July 22, 1913, and more than two years after the denial of said petition for a rehearing, said writ of error was filed in the Clerk's office of said Supreme Court of the State of California.

On said July 22, 1913, and more than two years after the denial of said petition for a rehearing, the bond required by said Chief Justice as aforesaid was filed in the Clerk's office of said State Supreme Court; that said bond was not approved by said Chief Justice until July 21, 1913, more than two years after the denial of said petition for a rehearing.

On said July 22, 1913, citation was thereupon issued, which said citation has been served upon me and is returnable in said Supreme Court of the United States on or about the 23rd day of September, A. D. 1913.

Said appeal by way of writ of error has not as

yet been docketed in said Supreme Court of the United States.

H. J. VAN NESS.

Subscribed and sworn to before me this 12th day of September, A. D. 1913.

(Seal) D. L. SMITH,

Notary Public in and for the County of Alameda, State of California.

(Title of Court and Cause.)

Clerk's Office of the Supreme Court of the State of California, San Francisco, California.

CLERK'S CERTIFICATE OF FACTS.

The undersigned, Clerk of the Supreme Court of the State of California, hereby certifies that the following facts appear of record in the Register, Minutes, Papers and Proceedings of the Supreme Court of the State of California in the case designated and entitled in said Supreme Court of the State of California as "Sacramento Number 1766," "H. J. Van Ness, Respondent, versus John Roney, J. A. Crane, A. P. Wright, J. F. Hayden, John Doe, Jane Doe and Richard Roe, Appellants," in which said case there has been filed in this office a writ of error on behalf of said Appellants to the Supreme Court of the United States, to-wit:

FIRSTLY: That the following is a true and correct transcript of said Register of said Supreme Court

of the State of California in said cause from June 6, 1911, to July 22, 1913, both dates inclusive:

1911

June 6. The order appealed from is affirmed.

Lorigan, J.

We concur,

Henshaw, J.

Melvin, J.

June 26. Filed Petition for Rehearing.

July 7. By the Court,

Rehearing denied July 6, 1911.

July 7. Remittitur to County Clerk.

1913

May 31. Filed Petition for Writ of Error and Assignment of Errors.

June 19. Petition for Writ of Error granted. "See Minutes."

July 22. Filed Writ of Error.

July 22. Filed Bond.

July 22. Filed Citation.

SECONDLY: That the following is a true and correct transcript of the Minutes of said Supreme Court of the State of California in said cause relating to the granting of said Writ of Error:

"Sac. 1766

"Van Ness)
v.) PETITION FOR WRIT OF ERROR.
"Roney et al.)

"The above petition for a writ of error is granted. This order is to take effect on the approval of

undertaking in penal sum of five hundred dollars."

"Dated June 19, 1913.

"W. H. BEATTY,

"Chief Justice of the Supreme Court of the State of California."

LASTLY: That the following is a true and correct transcript of the approval of said bond last herein mentioned:

"I hereby approve the foregoing bond and surety this 21st day of July, A. D. 1913."

(Signed by Chief Justice of Supreme Court of the State of California.)

In witness whereof, the undersigned has hereunto set his hand and the seal of the Supreme Court of the State of California, this 11th day of September, A. D. 1913.

(Seal) B. GRANT TAYLOR,

Clerk of the Supreme Court of the State of California.

By I. ERB, *Deputy.*

(Title of Court and Cause.)

MOTION TO DISMISS PURPORTED WRIT OF ERROR.

Now comes H. J. Van Ness, the defendant in error, by Theodore A. Bell, his counsel, and moves this Court to dismiss and quash the paper purporting to be a writ of error herein for want of juris-

diction and because the paper purporting to be a writ of error is informal, irregular and insufficient on the grounds stated in the annexed argument and upon other grounds and particularly because said purported writ of error was not filed in the Clerk's office of the Supreme Court of the State of California within the time allowed by Section One Thousand and Eight of the Revised Statutes of the United States.

THEODORE A. BELL,
Attorney and Counsel for Defendant in Error.
C. H. BRAYNARD
and C. F. KIMBALL,
Attorneys for Defendant in Error.

(Title of Court and Cause.)

NOTICE OF SUBMISSION OF MOTION TO DISMISS.

Sir: Please take notice that on the annexed verified statement and certificate of facts herein, and on all the papers and proceedings herein, I shall submit to the Supreme Court of the United States, at a Stated Term thereof, on Monday, October 27th, 1913, at the Capitol, in the City of Washington, in the District of Columbia, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy; and that I shall submit with said motion and in support of the same the arguments annexed to said statement of facts.

San Francisco, California, September 12, A. D. 1913.

Yours respectfully,

THEODORE A. BELL,

Attorney and of Counsel for Defendant in Error,
Crocker Building, San Francisco, California,
612 Market Street.

C. H. BRAYNARD,
and C. F. KIMBALL,
Attorneys for Defendant in Error.

To A. E. BOLTON, ESQ.,
Attorneys for Plaintiffs in Error,
Crocker Building, San Francisco, California, 612 Market Street.

And TAYLOR & TEBBE, ESQS.,
Yreka, California,

And D. J. HALL,
Richmond, California,
Attorneys for Plaintiffs in Error.

(Title of Court and Cause.)

PROOF OF SERVICE.

Personal service upon the undersigned at San Francisco, California, of the foregoing and hereunto attached NOTICE OF SUBMISSION OF MOTION TO DISMISS, MOTION TO DISMISS PURPORTED WRIT OF ERROR, AFFIDAVIT OF H. J. VAN NESS, CLERK'S CERTIFICATE OF FACTS, *and* BRIEF AND ARGUMENTS ON MOTION TO DISMISS WRIT OF ERROR, as well as the receipt by the

undersigned at said place of a copy of each of said papers, is hereby admitted this 16th day of September, A. D. 1913.

A. E. Bolton,
Taylor & Tebbe,
D. J. Hall,
Attorneys for Plaintiffs in Error.

Crocker Building, 612 Market Street, San Francisco, California.

OPINION

UNION PACIFIC RAILROAD COMPANY *v.* SNOW.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 682. Submitted October 14, 1913.—Decided December 1, 1913.

Courts will not enforce a literal interpretation of a statute if antecedent rights are affected or human conduct given a consequence the statute did not intend.

Union Pacific Railroad Co. v. *Laramie Stock Yards*, *ante*, p. 190, followed to effect that the act of June 24, 1912, c. 181, 37 Stat. 138, permitting state statutes of limitation to apply to adverse possession of portions of the right of way granted to railroads under the act of July 1, 1862, did not have retroactive effect.

Courts are repelled from giving such a construction to a statute as will raise grave doubts of its legality as well as of its justice.

The act of June 24, 1912, did not amount to a forfeiture of that part of the right of way granted under the act of July 1, 1862, not actually occupied by the railroads; *quære* whether such a construction of the act of 1912 would not render it illegal.

133 Pac. Rep. 1037, reversed.

THE facts, which involve the construction and application of the Railroad Land Grant Act of July 1, 1862, and the act of June 24, 1912, and the extent of rights claimed to have been acquired under the latter act by adverse possession in a railroad right of way, are stated in the opinion.

Mr. N. H. Loomis, *Mr. C. C. Dorsey* and *Mr. E. I. Thayer* for plaintiff in error.

Mr. Milton Smith, *Mr. Charles R. Brock* and *Mr. W. H. Ferguson* for defendants in error:

Any title which plaintiff or its predecessors ever had in or to the premises in controversy emanated from the act of July 1, 1862, and was a limited or determinable fee conditioned upon the continued use of said right of way for railroad purposes. *Stuart* v. *Un. Pac. R. R. Co.*, 227 U. S. 342; *M., K. & T. R. Co.* v. *Kan. P. R. Co.*, 97 U. S. 491, 494; *United States* v. *Kan. P. R. Co.*, 99 U. S. 455; *Nor. Pac. Ry. Co.* v. *Smith*, 171 U. S. 260; *Nor. Pac. Ry. Co.* v. *Townsend*, 190 U. S. 267, 271; *Nor. Pac. Ry. Co.* v. *Ely*, 197 U. S. 1; *Oregon Short Line* v. *Quigley*, 10 Idaho, 770; *Universalist Society* v. *Boland*, 155 Massachusetts, 171; Greenleaf's Cruise on Real Property, Tit. 13, c. 2, § 64; 2 Blackstone, 155; 4 Kent's Comm. (13th ed.), 134; *D. & S. F. Ry. Co.* v. *School District*, 14 Colorado, 327.

Under the allegations contained in the second defense of the answers, the title or ownership of the land in controversy was claimed by or through adverse possession of the character and duration prescribed by the laws of Colorado, and the Supreme Court of Colorado in these cases held that the allegations of said second defense were sufficient under the state statutes to establish title by adverse possession. *Snow* v. *Un. Pacific R. R. Co.*, 133 Pac. Rep. 1037; *Sides* v. *Un. Pacific R. R. Co.*, 133 Pac. Rep. 1040; *Laas* v. *Newkirk*, 39 Colorado, 78; *Hurd* v. *McLellan*, 1 Colo. App. 327; *Latta* v. *Clifford*, 47 Fed. Rep.

614, 619; *Elder* v. *McClaskey*, 70 Fed. Rep. 529; *Scott* v. *Mineral Development Co.*, 130 Fed. Rep. 497; *S. C.*, certiorari denied, 196 U. S. 640; *Harending* v. *Reformed Dutch Church*, 16 Pet. 455; *Santee River Cyprus Co.* v. *Jones*, 60 Fed. Rep. 360; *United States* v. *One Lot of Land*, 178 Fed. Rep. 334; *Green* v. *Neal*, 6 Pet. 291.

The title acquired by defendants under the adverse-possession statutes of Colorado was precisely equivalent in contemplation of law to such title as they would have acquired had the railroad company expressly granted to them all its right, title, and interest in the premises. *Nor. Pac. Ry. Co.* v. *Ely*, 197 U. S. 1; *Sharon* v. *Tucker*, 144 U. S. 533, 543; *Toltec Ranch Co.* v. *Cook*, 191 U. S. 532, 538; 3 Washburn on Real Property (5th ed.), 176.

The implication of a grant from the railroad company arising out of the adverse possession of the defendants is conclusive evidence of a voluntary abandonment of the premises by the railroad company. *Stevens* v. *Norfolk*, 42 Connecticut, 377; *Livermore* v. *White*, 74 Maine, 452; *Myers* v. *Spooner*, 55 California, 257; *Davis* v. *Perley*, 30 California, 630; *North American Co.* v. *Adams*, 104 Fed. Rep. 404.

The act of June 24, 1912, was equivalent to a reëntry or declaration of forfeiture or reverter upon the part of the United States of the land in controversy, because of its abandonment and non-user as a railroad right of way, and had the effect of confirming in the defendants the title acquired by them by adverse possession and under the patent issued by the United States to their predecessor in title on November 5, 1878. *Nor. Pacific Ry. Co.* v. *Ely*, 197 U. S. 1; *Atl. & Pac. R. R. Co.* v. *Mingus*, 165 U. S. 413, 430; *Schulenberg* v. *Harriman*, 21 Wall. 44; *Spokane & B. C. Ry. Co.* v. *Washington &c. Ry. Co.*, 219 U. S. 166.

A legislative act passed subsequent to the entry of a judgment in a lower court, and while a case is pending in an appellate court on appeal or writ of error, may be con-

sidered and applied by the appellate court. *Pennsylvania* v. *Wheeling Bridge Co.*, 18 How. 421, 430; *Nor. Pac. Ry.* v. *Ely*, 197 U. S. 1; *United States* v. *Schooner Peggy*, 1 Cr. 103, 110; *Am. Sugar Co.* v. *New Orleans*, 119 Fed. Rep. 691; *Canal Co.* v. *Western Md. R. R. Co.*, 99 Maryland, 570.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This case was submitted at the same time as No. 570, just decided. It is ejectment for lands, part of the right of way granted to the Leavenworth, Pawnee & Western Railroad Company by the act of July 1, 1862, c. 120, 12 Stat. 489, to which right of way plaintiff in error (designated herein as plaintiff) is the successor. The action was brought in the District Court of Arapahoe County, State of Colorado.

The sufficiency of the complaint is not questioned, and it is enough to say that it is, in legal effect, the same as in case No. 570, with only such differences as are necessary.

The answer of defendants in error (called herein defendants) set up three defenses and a counter claim. The first answer admits the incorporation of plaintiff and denies all other allegations of the complaint. The second defense alleges that under certain acts of Congress, subsequent to the act of 1862 and prior to the incorporation of the companies, the right of way of the companies was made 200 feet wide instead of 400 feet, that is, 100 feet from the center line of the railroad track. That the land sued for, which is in possession of the defendants, is more than 100 feet from such center line; that neither plaintiff nor any of its predecessors have been in possession of any portion thereof and have not used the same, nor has it needed to use the same for railroad purposes. That defendants, and those under and through whom they claim title, acquired the title under and by virtue of a patent from the

United States issued November 5, 1878, and various mesne conveyances and have been in the adverse possession of all of the property described continuously since the patent was issued, which is more than the full period of seven years next before the institution of the action; have paid and caused to be paid taxes thereon, and that defendants now plead and rely upon the statute of limitations of the State of Colorado.

The third defense alleges that the right received by the corporation which was created by the act of Congress of 1862 or by its successors or assigns was at most, the grant of a limited fee and made on the condition that the property should revert to the United States if it should not be appropriated and used for a railroad within a reasonable time or should cease to be used for railroad purposes. That thereafter, before the land was used for such purposes, the right of reverter which was retained by the United States, was conveyed by the United States to defendants and their grantors by a patent which was issued by the United States to the vendor of defendants in 1878. That neither plaintiff nor any of its predecessors used or occupied the land for railroad purposes or for any purposes whatever and on account thereof lost any and all right thereto and the property reverted to the United States and to defendants; that neither plaintiff nor any of its predecessors ever needed the property or any part thereof for railroad purposes and can never use the same for such purposes. That on account of failure to use or occupy the land for a period which now approximates fifty years next ensuing after the approval of the act of 1862, the limited fee which may have been granted to plaintiff ceased and determined and the property reverted to the United States and its grantees.

The counter claim repeats some of the allegations in regard to the width of the right of way and defendants' adverse possession of the land outside of the 100 feet on

either side of the center of the railroad track, alleges the value of improvements made thereon by defendants at $1,500 and claims the reimbursement thereof in case of recovery by plaintiff.

Plaintiff demurred to the second and third defenses and to the counter claim. The demurrer was sustained. The case was subsequently tried on the issues made by the complaint and the first answer thereto.

At the trial the defendants objected to any testimony being introduced and moved to dismiss the complaint on the ground that no right of way was granted to plaintiff "at the place in dispute" or no grant of right of way in excess of 100 feet on either side of the center line of plaintiff's track. The objection was overruled and defendants excepted.

It was then stipulated that witnesses would testify to the various steps in the title of plaintiff, that the railroad was constructed over the right of way described in the complaint, and that the railroad and the main track thereof are now in the same location in which they were at the time of the original construction; that the predecessors in title of plaintiff complied with all of the requirements of the various acts of Congress in the complaint mentioned, and that plaintiff is the owner of the lands, if any, conveyed to its predecessor companies under and by virtue of the said acts of Congress; that the land described in the complaint lies within 200 feet of the center of the main track of the railroad, but outside of a line of 100 feet; that the railroad is part of the railroad constructed from the Missouri River at the mouth of the Kansas River westward to a connection with the main line of the Union Pacific, as authorized by the acts of Congress, and has been, since its construction, continuously operated as a railroad in connection with the main line of the Union Pacific at Cheyenne, Wyoming. That defendants withhold possession of the lands from plain-

tiff and that possession was demanded before the commencement of the action.

Judgment of nonsuit was moved on the grounds stated in the motion to dismiss; also judgment for defendants. Both motions were denied and plaintiff was adjudged owner in fee of the lands, and that defendants had no right, title or interest therein. Judgment was entered accordingly. The judgment was reversed by the Supreme Court of the State. 133 Pac. Rep. 1037.

The Supreme Court decided that the Kansas Pacific became vested by the acts of July 1, 1862, and July 2, 1864, c. 216, 13 Stat. 356, with title to a right of way 400 feet wide through the land and that the Union Pacific, its successor in title, is the owner of the right of way. The court rested this conclusion on *Stuart* v. *Union Pacific Railroad Co.*, 227 U. S. 342. It hence decided that "the determination of the court of the facts found upon the issue raised by the first defense was . . . in conformity with the decision of the Supreme Court of the United States." And the Supreme Court also decided that the District Court, in sustaining the demurrer to the second defense which pleaded the statute of limitations, followed the decision of this court, and cited *Kindred* v. *Union Pacific Railroad Co.*, 168 Fed. Rep. 648, 653; *S. C.*, affirmed 225 U. S. 582; *Northern Pacific Railroad Co.* v. *Smith*, 171 U. S. 260, 267; *Northern Pacific Railway Co.* v. *Ely*, 197 U. S. 1; *Northern Pacific Railway Co.* v. *Townsend*, 190 U. S. 267, to the effect that individuals could not for private purposes acquire by adverse possession under state statutes any portion of a right of way granted by the United States to a railroad company. "So," the court said, "it is plain that prior to June 24, 1912, an individual could not acquire title to any portion of the 400 feet right of way by the statute of limitations or adverse possession, and the judgment of the lower court on this issue was correct." But it was remarked that the act of June 24,

though passed while the case was pending on appeal, nevertheless applied to the case, on the authority of certain cases which were cited.

The cited cases express the principle that a judgment, though not erroneous when rendered, may become so by a subsequent law. Or if an event occurs after an appeal which makes it impossible for the appellate court to enforce its decision, the case will be dismissed. *United States* v. *The Peggy*, 1 Cr. 103; *Board* v. *Glover*, 160 U. S. 170; *S. C.*, 161 U. S. 101; *Dinsmore* v. *Express Co.*, 183 U. S. 115. Two of the members of the court dissented and expressed the view that as the judgment of the lower court was "in strict conformity with the decisions of the Supreme Court of the United States, and therefore when rendered was not erroneous," it was the duty of the court to affirm it.

In deciding that the act of June 24 was controlling, the Supreme Court of Colorado necessarily gave retrospective operation to the act. This was error. *Union Pacific Railroad* v. *Laramie Stock Yards Co.*, decided this day, *ante*, p. 190.

It was contended in that case that the grant of the right of way was only a grant of the right to use and that whenever and if not so used or for any reason became forfeited, it would revert to the grantor. It was recognized that to enforce the forfeiture and convey the right which had reverted, some act of the United States was necessary. This condition, it was contended, was satisfied by the act of June 24, 1912, c. 181, 37 Stat. 138, enacted, it was further contended, under the power reserved to Congress by the acts of 1862 and 1864 to alter or amend the charters of the companies. We rejected the contention and we said, besides, that even if the act be so regarded, its effect was to be determined by the time it was intended to operate, whether retrospectively or prospectively. What we said is applicable here. It is contended here that the

right of way was derived through the act of July 1, 1862, and that the title granted to the companies "was a fee upon limitation, and that the estate continued *so long as*, or while, the railroad companies continued to use the land granted for railroad purposes, and terminated *ipso facto* by the cessation of such use." And it is further contended that no act was necessary upon the part of the United States to work the forfeiture or reinvest the United States with complete title to the land granted.

The bearing of the first contention we shall presently consider; the other has no foundation in the granting acts nor in the decisions interpreting them, some of which are cited above. It is opposed by the act of June 24, which leaves the right of way as originally granted and to the extent granted in the railroad companies, except where they had *theretofore* conveyed parts of the same and where parts of it shall be held by adverse possession.

It is, however, contended that if some act of the United States was necessary to effect a forfeiture of the right of way, the act of June 24, 1912, was sufficient for that purpose. If this be conceded, *arguendo*, and if it be also conceded that the grant of the right of way was of a limited fee, we are brought to a consideration of the effect of the act, whether it applies to a past or a future possession; and we have decided that it applies to the latter. *Union Pacific Railroad Co.* v. *Laramie Stock Yards Co.*, *ante*, p. 190.

This conclusion is, of course, contested by defendants in an argument which it is, however, unnecessary to answer in detail. It is asserted that the act "operates *in præsenti* in so far as it conveys the reversionary interest of the United States to the persons entitled to the benefit of the act, or confirms their preëxisting titles." Special emphasis is put upon the words "is claimed" of the act as necessarily intended to apply to titles claimed at the time of the passage of the act by adverse possession. "Such

titles," it is said, "must have been initiated prior to the enactment of the act." For that reason, it is further said, "the act cannot be said to be retrospective, because the language used simply designates the classes of persons to whom confirmatory grants are made." But these considerations are simply the result of dwelling upon the literal terms of the act. But this is obnoxious to the rule of the cases. Courts will not, as we have seen, enforce a literal interpretation when by doing so antecedent rights are affected or human conduct given a consequence it did not intend. Such a purpose the courts refuse to assign to the legislature unless compelled by language explicit and imperative. And we have pointed out that we are repelled from so doing by grave doubts of its legality as well as of its justice. These considerations need not be further expanded. Their strength has been pointed out and their sufficiency to prevail over a literal interpretation of a statute.

Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE HUGHES dissents.

MR. JUSTICE HOLMES and MR. JUSTICE PITNEY took no part in the decision.

UNION PACIFIC RAILROAD COMPANY *v.* SIDES.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 683. Submitted October 14, 1913.—Decided December 1, 1913.

Decided on the authority of *Union Pacific Railroad Co.* v. *Snow*, *ante*, p. 204.

133 Pac. Rep. 1040, reversed.

THE facts are stated in the opinion.

Mr. N. H. Loomis, *Mr. C. C. Dorsey* and *Mr. E. I. Thayer* for plaintiff in error.

Mr. Milton Smith, *Mr. Charles R. Brock* and *Mr. W. H. Ferguson* for defendants in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Action in ejectment, brought by plaintiff in error, called here plaintiff, against defendants in error, here called defendants, in the District Court of Arapahoe County, State of Colorado.

Except as to the description of the land the complaint is substantially the same as that in No. 682 and presents the same legal rights and titles. Defendant Sides demurred to the complaint; Scherrer denied being in possession of the land and disclaimed any claim to it. The demurrer was overruled and Scherrer answered, setting up defenses which are in substance the same as in No. 682. To the defenses plaintiff filed demurrers, which were sustained. Sides elected to plead no further and the case coming on for trial and certain facts being agreed upon as testified to, objection to the materiality of which was made, motions to dismiss and for judgment were also made and overruled. Judgment was entered for plaintiff. It was reversed by the Supreme Court of the State, for the reasons stated in its opinion in *Snow* v. *Union Pacific Railroad Co.*, that is, No. 682, *ante*, p. 204, 133 Pac. Rep. 1040.

This case was submitted with No. 682, involves the same questions and is determined by its decision.

Judgment reversed and cause remanded for further proceedings not inconsistent herewith.

MR. JUSTICE HUGHES dissents.

MR. JUSTICE HOLMES and MR. JUSTICE PITNEY took no part in the decision.